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INDIANA REPORTS.

VOL. XXIV.

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

By BENJAMIN HARRISON, A. M.,
OFFICIAL REPORTER.

.....

VOL. XXIV.

CONTAINING THE CASES DECIDED AT THE MAY TERM, 1865, AND
CERTAIN CASES DECIDED AT THE NOVEMBER TERM, 1865.

INDIANAPOLIS:
DOUGLASS & CONNER.
1866.

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Rec July 26. 1866

JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. JEHU T. ELLIOTT,*
HON. JAMES S. FRAZER,
HON. ROBERT C. GREGORY,
HON. CHARLES A. RAY,

* The Hon. JEHU T. ELLIOTT was Chief Justice at the May Term, 1865.

**For previous decisions of the Supreme Court of this State,
overruled, affirmed, or modified, see INDEX, tit. CASES
OVERRULED, &c.**



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RULES
OF THE
SUPREME COURT OF INDIANA,
ADOPTED NOVEMBER 27, 1865.

RULE 81.—When an appeal shall have been dismissed, the transcript of the record of the Court below shall not be withdrawn from the files of this court, to be used in another appeal, or for any other purpose, without special leave of the court in term, or of a judge thereof in vacation, and only upon good cause shown by affidavit.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

**AT INDIANAPOLIS, MAY TERM, 1865, IN THE FORTY-NINTH
YEAR OF THE STATE**

BICKEL v. SHEETS.

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126	331

GAMING CONTRACT.—A contract for the sale of property intended to be used for the purpose of gaming is not void under the statutes of Indiana, though the seller at the time of sale was informed of the purpose to which the property was to be applied.

SAME.—Where a thing is sold under such circumstances as to make the seller an accessory before the fact to a felony, he cannot recover the price.

APPEAL from the *Huntington Common Pleas*.

GREGORY, J.—The summons was returned not found as to *Wrede*. *Bickel* answered as follows: "That he admits the execution of the note sued on, but that said note was given for and upon an illegal consideration, in that said note was given for and in consideration of a gaming table, known as a billiard table, for the purpose of being used in wagering articles of value thereon, contrary to the statutes of the State of Indiana, subversive of public morality, and leading to the commission of crime."

The plaintiff below demurred to the answer, the justice sustained the demurrer and the defendant excepted.

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Bickel v. Sheets.

The plaintiff, notwithstanding the demurrer was sustained, filed a reply to the answer, denying each and every allegation therein. The trial before the justice resulted in a judgment in favor of the plaintiff, for the amount secured by the note. Appeal to the Common Pleas Court. No notice was taken of the demurrer in the Common Pleas Court, but the transcript of the record says, "*the issue in this behalf being joined*, and neither party requiring a jury, this cause is left to the summary determination of the Court," &c. Finding for the plaintiff. Motion for a new trial overruled. The evidence is in the record.

The appellant is the only witness. He testified as follows: "I am the defendant in this action; the note in suit was given in consideration of a billiard table sold to me by the plaintiff. I told him that some of my friends wanted me to get a billiard table for them to game on, in my saloon, which I was then keeping, and that I wanted to buy one for that purpose, which he proposed to sell me. I asked him how it could be used in that way, so as to make money out of it. He said that I could charge ten cents per game, and that they usually played for the liquor, for which I would get pay besides. For this purpose I bought the billiard table, and gave the note in suit. I stated to him at the time that I wished to use it for gaming."

The misdemeanor act provides that "every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffle board, faro bank, nine pin or ten pin alley, or billiard table, *for the purpose of wagering any article of value thereon*, shall be fined," &c. 2 G. & H., § 74, p. 477.

In the case of *Cummings v. Henry*, 10 Ind. 109, this court held that a contract of sale of property intended to be used for the purpose of gaming, is not void under our statutes. The question arose on the following instruction: "If *Cummings* sold the mare to *Henry* as a race nag, for the purpose of being run on a wager for money, or property, and *Cummings* knew that fact, the contract is void, as being against public policy." HANNA, J., in delivering the opinion

of the court says: "In the case at bar, the distinction does not appear to have been sufficiently kept up between transactions in which the sale and the illegal acts are so mixed and blended as to form really but one contract, and those where the sale and the illegal act are distinct, and do not necessarily, by the contract, form part of the same transaction. No doubt a contract expressly providing that a race should be run for a wager would be void, as if the contract of sale in this case had been made by the vendor to depend upon, or be connected with, the result of a race for a wager.

"If a mechanic were to sell guns to persons whom he knew proposed target shooting for a wager, we cannot believe he would be remediless by the laws in force in this state, when he should seek to recover the price of such guns.

* * * * *

"The consideration of this contract was not a wager, nor that a race should be run for a wager, but it was the delivery of the animal, which might perhaps be used for that purpose. The consideration of the note is not therefore wicked in itself, nor is the sale of a horse prohibited by law.'

The sale of a billiard table is as lawful as the sale of a race-horse. It is not unlawful to own and keep it, but it is unlawful to keep it *for the purpose of wagering any article of value thereon*. There is nothing in the distinction attempted to be drawn by counsel, between the case at bar, and the one just cited. A billiard table may be used for recreation, a purpose as legal as any purpose to which a race-horse can be put. And the question is, shall this case be overruled. If this was an open question, unembarrassed by previous ruling, our decision might be different from our present determination, for we are free to confess that the weight of authority is against the right of recovery in the case in judgment.

The rulings of *Lord Mansfield* in the cases of *Holman et al.*

v. *Johnson*, Cowper's Rep. 341, and *Hodgson v. Temple*, 5 Taunton R. 181, cannot on any principle be reconciled with the rulings of *Chief Justice Eyre* and *Lord Ellenborough* in the cases of *Lightfoot v. Tenant*, 1 Bos. & Pull. 351, and *Langton v. Hughes*, 1 Maule & Selw. 593. These latter cases have been followed in *England* by the Common Pleas, sustained on error in the Exchequer Chamber, in the case of *The Gas Light and Coke Company v. Turner*, 5 Bingham's N. C. 666 (35 En. Com. Law), 6 Bingham's N. C. 320 (37 En. Com. Law.)

This conflict in the *English* cases is ably commented upon by *Chief Justice Robertson*, in the case of *Stede v. Curle*, 4 Dana's Rep. 381. After noticing the conflict he says:

"Such being the diverse views and opinions of some of the more prudent and respected of those most learned in jurisprudence, it might be deemed rash in this court now to express a conclusive opinion on the points which have been so ably discussed by others, who, on each side of the controversy, seem to be sustained by specious and imposing arguments, uncontrolled by positive authority. But, without engaging in the argument, or intending even to express a definitive opinion—which, as will presently be seen, is not now necessary—we feel that it may be but proper to suggest, in passing, that we would be inclined neither to concur with, or to dissent from, the doctrine of either party, *in extenso* and altogether, without limitation or qualification; but should rather incline to the conclusion, that, although, as we are disposed to think, a *simple knowledge*, by a vendor, of the fact that the vendee buys an article for the purpose, or with an intention, of using it in violation of the public law, or a principle of moral rectitude, may, in *strong and flagrant cases*, such as that supposed by *Chief Justice Eyre*, be a sufficient reason for withholding, from either party the aid of the law for enforcing the contract, yet there may be cases of a lighter shade, or less degree of enormity, in which the same fact might not, *alone*, be entitled to the same effect; and in the latter class, we would be inclined to

place the beer case decided by *Lord Ellenborough*. And the reason why we should be disposed to make any discrimination in consequence of the color or degree of the transgression contemplated by the buyer, and merely understood by the seller, and why, also, we are inclined to agree with *Chief Justice Eyre to some extent*, is just because it does seem to us that no one can sell a commodity, knowing that the buyer intends to use it for any purpose so flagitious as that of murder or treason, or other *flagrant* violation of the *fundamental* rights of man, or of society, without betraying such a degree of turpitude and recklessness as to implicate him as a *voluntary and active participant* in the unlawful design, and, as therefore, *quantum in illo*, willing and instigating a crime, which it is the *civil duty* of every citizen to *oppose*; and that the like knowledge alone, of the buyer's purpose of unlawful appropriation or use, would not, necessarily, lead to the like deduction as to the motive or conduct of the seller in every case of inferior degree, as the beer case; the case of the purchase of an article with the intention of again making a fraudulent sale or use of it; the case of a loan of money to a person who borrows for the purpose of re-lending to a stranger at illegal interest; the case of the sale of merchandise by a wholesale merchant, in the regular course of his business, to one who, when he buys, intends to smuggle it into a foreign port, without paying the legal and accustomed duties; and many other cases of a similar kind, in which a citizen may be *neutral*, without being guilty of any *incivism*, or of any intentional participation in the unlawful design. In all such cases, it would seem to us, that in a commercial, busy and enterprising age, the law should not attempt to establish a morality so pure, and exact, and vigilant, as that which would make it the *legal duty* of every seller, of every vendible thing, to become a *casuist or censor*, so far as to make him responsible for the *known motives* of the buyer, and an *active and guilty co-operator* with him in his *contemplated* violation of law, of principle, or of justice."

We think it safe to say, that in all cases of a contemplated *felony*, where the act of selling is under such circumstances as would make the seller an accessory before the crime, he cannot recover from the buyer the purchase money of the thing so sold.

A late writer has attempted to state the true principle to be deduced from these and other conflicting authorities, in the following section: "But the mere fact that the seller knows that the goods sold will be applied to an unlawful purpose, will not ordinarily be sufficient to deprive him of his right to payment therefor; he must be, in some manner, implicated in the transaction, and privy thereto. And therefore, it has been held that it is no defence to an action brought to recover the price of goods sold, that the vendor *knew* that they were bought for an illegal purpose, provided that it was not made a *part of the contract* that they should be used for that purpose, and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design, beyond the mere sale with the knowledge of the illegal intent of the purchaser. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is to be found in the question, whether the contract, on which the claim is founded, can be wholly disconnected from the illegal transaction, or whether it was in furtherance thereof. *Wherever goods have been sold for the express purpose of enabling a party to violate the law, the sale has been held to be void.*" Perkins' Ed. of Story on Sales, § 506.

The sentence in italics is susceptible of an interpretation that would embrace every selling, where the seller *knows* that the thing sold is to be used for an illegal purpose; but we presume the author intended this statement to be understood in a limited sense, so as to make it consistent with what precedes it.

The defence in the case at bar comes with an ill grace from the appellant. He was the party who intended to violate the law; he got the property of the plaintiff below; he does not attempt to rescind the contract by offering to

Cunningham v. Clark, Receiver of the Bank of the Capitol.

return it, but holds it, and attempts to defeat the recovery for the purchase money, on the ground that the contract is against public morals. It may be so, but a reward for his dishonesty would not, in our opinion, tend to promote that which he has been instrumental in corrupting.

The judgment is affirmed, with 5 per cent. damages and costs.

J. R. Coffroth and *D. O. Daily*, for appellant.

W. C. Kocher, for appellee.

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CUNNINGHAM v. CLARK, Receiver of the Bank of the Capitol.

FREE BANK—FORFEITURE OF CHARTER.—A free bank organized under the act of May 28, 1852, failing to comply with the provisions of the act of March 8, 1855, (1 G. & H. 124,) did not lose its corporate existence, for all purposes, when the latter act came into force; but under section 48 of that act, its charter would not expire until March 1, 1857, and under section 6, 1 R. S. 1852, p. 240, the bank would have three years from that date to sue and be sued, and to settle, dispose of and convey its property, and divide the capital stock, but not to continue a banking business.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—*Clark*, as receiver of the property of the *Bank of the Capitol*, sued *John W. Dodd*, *Nathaniel F. Cunningham*, *Charles F. Allen* and *William J. Wallace*, for the wrongful conversion of an iron safe, counter and fixtures, and a desk, alleged to be of the aggregate value of 1820 dollars. *Dodd*, *Cunningham* and *Wallace*, disclaimed all interest in the property; that the property was not in their possession; that they never had or held the same in their own right; that it was placed in the office of the Auditor and Treasurer of State by *Aquilla Jones*, former treasurer, as the property of the State of Indiana, and formed a part of the furniture and fixtures in said offices, and that, at the close of the respective terms, of *Dodd* and *Cunningham*, the same was left by them in the said offices, and was by them turned over as the prop-

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erty of the state to their successors in office, and that the said property still remains in the custody of their successors.

The appellee moved to strike out this disclaimer. The court below took no action thereon.

The defendants below filed their answer in two paragraphs: first, general denial; second, property in the State of Indiana. Reply to second paragraph, general denial. The death of *Allen* was suggested, and the suit as to him abated. Trial by the court; finding for the defendants, *Dodd and Wallace*, and for the plaintiff against the defendant *Cunningham* for 2000 dollars. A motion by appellant for a new trial was overruled, and he excepted. The evidence is in the record.

The entries in the order book, and not the complete record, of the case of *John W. Hamilton*, administrator, &c., against *The Bank of the Capitol*, *John Wooley*, *Isaac Coffin* and *Michael Fitzgibbon*, under which *Clark* claims to act, were introduced in evidence. From these entries, it appears that the judgment was rendered on the 3d of *July*, 1858, and the plaintiff appointed receiver, &c., on the 7th of *December* following.

It is said by counsel, that an assignment made to the defendants, *Coffin* and *Fitzgibbon*, was set aside as being fraudulent on its face. That could only be made to appear by the introduction in evidence of the papers constituting, under the statute, the complete record. Without the complaint, it is impossible to know what assignment was so set aside.

The evidence shows that *The Bank of the Capitol* was a free bank, organized under the act of *May* 28, 1852, authorizing and regulating the business of general banking; that it did not comply with the requirements of the act of *March* 3, 1855, (1 G. & H. 124); that the bank owed the state some 5000 dollars for money on deposit; that the state took the property in controversy at 2000 dollars, and gave the bank credit for that sum; that this arrangement was made with *Wooley*, the president of the bank, *Fitzgibbon* and

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Coffin, on the 25th of *March*, 1858; that the property was moved to the state offices; that afterward, on the 25th of *June*, 1859, *Wallace*, as sheriff, sold the property on an execution issued on a judgment in favor of *Allen*, rendered on the 12th of *January*, 1859, and *Palmer*, the deputy auditor, bought it in at 623 dollars and 67 cents, for the state.

On the 5th of *July*, 1859, *Clark* demanded the property of defendants *Cunningham* and *Dodd*; the former said it was in his custody as the property of the state; that it had been bought by *Mr. Jones* for the use of the state, and declined giving it up. The property was then, and still is, in the treasurer's office.

There are two questions made in argument. It is contended by the counsel for the appellant: first, that he is not liable for the wrongful *conversion* of the property under the facts of the case; second, that the evidence shows that the property is the property of the state.

We will examine the latter question only, as that disposes of the case, and renders a decision of the former unnecessary.

It is claimed by the counsel for the appellee, that at the time of the purchase by the state there was no bank in existence, and that *Wooley's* powers terminated with the existence of the corporation. The case of *Wilson v. Tesson et al.* 12 Ind. 285, is cited in support of the proposition that the bank had ceased to be a corporation, but the question now before the court was not involved in that case. *PERKINS, J.*, in delivering the opinion of the court, says: "*The Bank of the Capitol* having failed to comply with the requirements of the act of 1855, had no power to do *general banking business in its corporate capacity*, after it came into force."

By the provisions of the act of 1855, the bank did not cease to be a corporation for all purposes. The 48th section reads thus: Every bank or banking association, organized under the provisions of the general banking law of this

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state, may, in case it shall immediately after the passage of this act pay all its circulating notes in coin, upon demand, have until the *first day of March, 1857, to wind up, or accept the provisions of this act.*" Under this section, the bank continued to be a corporation, for the double purpose of winding up *and accepting the provisions of that act.*

The general law respecting corporations provides that "All corporations whose charters shall expire by limitation, forfeiture or otherwise, shall nevertheless be continued bodies corporate for three years, after the time they would have been so dissolved, for the purpose of prosecuting and defending suits, to which they are a party, and to enable them to settle, dispose of and convey their property, and divide the capital stock, but not to continue the business for which such corporations were established." 1 R. S. 1852, § 6, p. 240.

"At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion, in such an event, is a condition annexed by the law, inasmuch as the cause of the grant has failed. The personal estate in *England* vests in the king; and in our own country in the people, or state, as succeeding to this right and prerogative of the crown. The debts due to and from it are totally extinguished; so that neither the members nor directors of the corporation can recover or be charged with them in their natural capacities." Angall & Ames on Corporations, ch. 22, § 6, (8d ed.,) and the authorities there cited.

If the position assumed by the counsel for the appellee is correct, we cannot see by what right *Hamilton*, as administrator of *Morrison*, recovered his judgment against the corporation on the 3d of *July, 1858*, long after the time limited by the act of 1855 for the bank to wind up.

But we think that these two statutes should stand and have their full force; that the charter of *The Bank of the Capitol* did not expire, within the meaning of the general law respecting corporations, until *March 1, 1857*, and that

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the bank had three years from that time to sue and be sued, to settle, dispose of and convey its property, and divide the capital stock, but not to continue the business for which it was established. We are not inclined to follow the case of *Wilson v. Tesson et al.*, *supra*, further than the point ruled, and as this is not in conflict with this opinion, we shall express no opinion as to the propriety of overruling that case.

With this view of the law, we have no difficulty in determining that the property in controversy was in the state, and that a new trial ought to have been granted.

The judgment is reversed, and the cause remanded to said court, with directions to award a new trial, and for further proceedings.

Oscar B. Hord, Attorney General, and *McDonald & Roache*, for appellant

H. C. Newcomb and *B. K. Elliott*, for appellee.

KENYON and Others v. SMITH.

USURY—PROVING FOREIGN STATUTE.—Suit upon promissory notes reserving interest at the rate of ten per cent. Answer that the notes were made and delivered in the State of *New York*, and not in the state of *Michigan*, where they bore date; that by the laws of *New York* seven per cent. interest only could be taken or reserved, and if a greater rate of interest should be reserved, such note was void. Two sections of the law of *New York* were set out, the first fixing the legal rate of interest at seven per cent., and the second providing that when a greater rate "*than as above described*" was reserved, the contract should be void. On the trial of the cause, the second section only of the law of *New York* was given in evidence, and judgment was given for the principal of the notes and interest at the rate of *six* per cent.

Held, that as the section of the law of *New York* given in evidence, did not show what the legal rate of interest in that state was, the judgment of the court was not erroneous.

APPEAL from the *Elkhart* Common Pleas.

ELLIOTT, C. J.—Suit by *Smith*, the appellee, against the appel-

lants, on three several promissory notes, executed by the appellants to *Smith*—one for \$2,000, and the others for \$1,000 each—all dated *April 1, 1859*, and payable two years after date.

Issues of fact were formed and tried by the court, by agreement of the parties. The court found for the plaintiff the amount due upon the notes, computing interest at the rate of *six per cent*.

The notes are all dated "*Edwardsburgh, Cass county, Michigan,*" and bear *ten per cent* interest.

A motion for a new trial, made by the defendants, was overruled, and judgment upon the finding. The defendants appeal.

The only question presented by the appellants' brief, for the reversal of the judgment, arises upon the finding of the court on the evidence, under the *fourth* paragraph of the defendants' answer. That paragraph alleges that the notes were made and delivered to the plaintiff in the State of *New York*, and not at *Edwardsburgh*, in the State of *Michigan*, as they purported; but that they were so dated for the fraudulent and corrupt purpose of avoiding the usury laws of the State of *New York*. That by the statute of the latter state, in force at the time said notes were executed, *seven per centum* interest per annum, only, could be taken or reserved, and if a greater rate of interest should be reserved, such note or contract is declared to be void. The paragraph sets out what purports to be the *first* and *fifth* sections of an act of the Legislature of the State of *New York*.

The *first* section fixes the rate of interest upon the loan or forbearance of money, &c., at *seven per cent*. The *fifth* section is as follows: "Sec. 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatever, (except bottomry and *respondentia* bonds and contracts,) and all deposits of goods or other things whatever, whereupon, or whereby, there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money,

goods or things in action, than as above described, shall be void; but this act shall not affect such paper as has been made and transferred previous to the time the same takes effect."

The evidence is all contained in the record. It shows that a part of the makers of the notes resided in this State, and the others in the State of *Michigan*. The notes were drawn up and signed by all the makers in the State of *Indiana*, and were dated in *Michigan*, and regarded as *Michigan* notes, for the purpose of avoiding the usury laws of *Indiana*. The note for \$2,000 was blank, as to the amount, and all of them were blank as to the *day* of their date, and the time (two years) they were to run, and in that condition were delivered to *Solomon N. Chappell*, who, as the agent of the makers, delivered them to the plaintiff in the State of *New York*, where he resided, and received from him therefor, for the makers, the sum of four thousand dollars.

The record shows that the defendants, on the trial, offered and read in evidence the *fifth* section of the statutes of the State of *New York*, as above copied into this opinion. The *first* section set forth in the answer was not given in evidence; nor is there any evidence in the record showing, or tending to show, when the said fifth section was enacted or took effect.

Allowing that, under the circumstances stated, the notes are deemed to have been made in the State of *New York*, where they were *delivered* to the plaintiff, and governed by the laws of that State—a question that we do not decide—still the finding of the Court below was clearly right. The section of the statute given in evidence declares that all bonds, bills, notes, &c., whereby a greater rate of interest is reserved or taken "than as above described," shall be void.

The *rate* of interest referred to, is not stated in that section of the statute, nor was there any evidence before the Court from which the Judge who tried the case could judicially determine such rate. For aught that appears in the evi-

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dence, it may have been *ten* per cent.—the amount secured by the note.

We think the court below did not err in its finding, and the judgment must, therefore, be affirmed.

The judgment is affirmed, with ten per cent. damages and costs.

R. Lowry, for appellants.

H. C. Newcomb and *J. Tarkington*, for appellees.

BABCOCK and Others v. JORDAN.

MORTGAGEE—PURCHASER IN GOOD FAITH.—The mortgagee who takes a mortgage in good faith to secure a pre-existing debt, is entitled to be regarded as a purchaser for a valuable consideration, and to be protected as such. Page 20.

JUNIOR MORTGAGE.—A holder of a junior mortgage is not bound to pay off a prior incumbrance, unless he expressly agrees to do so.

APPEAL from the *Marion* Circuit Court.

ELLIOTT, C. J.—*Jordan*, the appellee, sued the appellants and others to recover against *Melville D. Babcock*, one of the defendants, for fraud in the sale of real estate, and to make the amount recovered a specific lien on certain lots in the city of *Indianapolis*.

The complaint alleges that, on the 28th day of *January*, 1859, the plaintiff was the owner of lot 59, in the north half of lot 9, in *McCarty's* subdivision of out-lots numbered 118 and 119, in the city of *Indianapolis*. That the defendants, *Melville D. Babcock* and *Thomas Springstead*, represented to the plaintiff that said *Springstead* was the owner in fee, by a good and unincumbered title, of 375 acres of land, situated in *Randolph* county, in the state of *Virginia*, which said *Springstead* had bargained and sold to said *Melville D. Babcock* for a consideration then fully paid; and thereupon the said *Babcock* proposed to the plaintiff to have said land conveyed to him, to pay him \$80 in cash, and

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deliver to him two horses of the value of \$100 each, in consideration of the conveyance by the plaintiff of the lots in *Indianapolis*, and their appurtenances, subject to the payment of a balance due upon a mortgage to the estate of *Nicholas McCarty*, deceased, for \$180. That the plaintiff, relying upon the representations of said *Babcock* and *Springstead*, and being ignorant of the truth or falsity thereof, and having no means of information upon the subject, accepted said proposition, and then received of said *Melville D. Babcock* the sum of \$80, the two horses, and the conveyance, by *Springstead*, at the request of said *Babcock*, of 875 acres of land in *Randolph* county, *Virginia*, by a deed of warranty. That *Melville D. Babcock* has been, and still is, insolvent, and by reason thereof had, for a long time, been carrying on business in the name of his father, *Henry Babcock*, an old man without means. That the plaintiff, by the direction of *Melville D. Babcock*, conveyed said lots to *Henry Babcock*, subject to the mortgage aforesaid to the estate of *McCarty*, "which said *Babcock* agreed to pay," and has paid thereon the sum of sixty-three dollars and seventy-five cents, leaving a balance of 116 dollars and 25 cents, with accruing interest.

The complaint further avers, that the representations of *Springstead* and *Melville D. Babcock*, as to the title of *Springstead* to the *Virginia* lands, were wholly false; that he had no land in *Randolph* county, *Virginia*, whatever, which they well knew. That after the execution of the deed by the plaintiff to *Henry Babcock*, he and his wife, *Emily Babcock*, who are also made defendants, joined in executing a mortgage upon said lots to "*Babcock & Co.*," a firm composed of *John D. Phoenix*, *Francis M. Babcock*, *John Babcock* and *Philip Phoenix*, professing to be made to secure the payment of \$1,689 and 89 cents, upon sundry notes dated *May 1, 1859*; that said notes and mortgage were made and given upon the consideration of, and to secure, a debt existing prior to the making of said conveyance, and prior to any contract or engagement to make the same, and that *Henry Babcock* paid no

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consideration for the lots, other than as part thereof was paid by *Melville D. Babcock*. The complaint further alleges that by reason of the fraud of *Melville D. Babcock* and *Springstead*, the plaintiff has not received the value of said lots by about \$1,000, and prays that, on the final hearing, the balance due the plaintiff may be decreed a charge on said lots, and that they be sold to pay the same, and for other and proper relief. The complaint was subsequently amended by averring that, after the commencement of the suit, *John D. Phoenix*, one of the defendants, had died, and his "unknown heirs" were made defendants.

On the 30th of *March*, 1861, *Philip Phoenix*, *Francis M. Babcock* and *John Babcock* appeared and answered in three paragraphs, as follows:

1. By general denial.
2. That on the 10th day of *May*, 1859, the said *Henry Babcock*, being indebted to them, who are wholesale grocers in the city of *New York*, by notes amounting to the sum of \$1,689, with his wife, *Emily Babcock*, executed to them a mortgage on the lots to secure said indebtedness; that at the *June* term, 1860, of the *Marion* Common Pleas Court, the last of the notes secured by the mortgage having matured, said defendants caused suit to be brought in said court for the foreclosure of the mortgage, and that such proceedings were had therein that afterward they recovered judgment against said *Henry Babcock* for the amount due on the notes, and for the foreclosure of the mortgage and the sale of said lots, in default of the payment of the judgment by *Henry Babcock*.

That afterward a proper order of sale was issued on the judgment and decree to the sheriff of *Marion* county, who afterward, on the 28th day of *July*, 1860, sold said lots to one *John Ketcham*, and that the said *Ketcham*, after receiving the sheriff's deed therefor, sold and conveyed the same to *John D. Phoenix*. They also deny all knowledge of the fraud charged in the complaint.

8. That one *William H. H. Johnson* purchased said lots

of one *Margaret McCarty*, and executed to her his note for \$520, being a part of the purchase money therefor; and on the same day the said *Johnson*, for the purpose of securing the payment of said sum, executed to said *Margaret McCarty* a mortgage on the lots; and the said sum of \$520 remaining unpaid, the said *Margaret* caused suit to be brought on said note and mortgage at the *June* term, 1860, of the *Marion* Court of Common Pleas, and such proceedings were had therein, in said court, that, on the 27th day of *June*, 1860, said *Margaret* recovered against the said *Johnson* the sum of 113 dollars and 68 cents, without relief from appraisement laws, and also a decree of foreclosure on the mortgage and for the sale of the lots. That said *Johnson* failing to pay said judgment, the clerk of said court issued to the sheriff of the county a copy of the decree, with an order for the sale of the lots to satisfy said judgment, interest and costs; and that the sheriff, having first legally advertised the same, did, on the 25th day of *August*, 1860, at public sale, sell the north half of said lots 118 and 119 to the defendant, *Francis M. Babcock*, for the sum of *seventy-five* dollars and *fifty-four* cents. That said sheriff thereupon executed to said *Francis M. Babcock* a deed of conveyance for the north half of said lots, &c.

The plaintiff replied:

First, by a general denial.

Second. "For further reply to the second paragraph of the answer the plaintiff says that the mortgage therein mentioned, was executed by said *Henry Babcock* for a debt existing long prior to the making and delivery of said mortgage, to-wit: before the said *Henry Babcock* acquired any title to said premises; and that before, and at the time of the purchase of said premises by said *Ketcham* at sheriff's sale, this suit was pending, and the said *Ketcham*, and all of said defendants, had due notice thereof," &c.

Third. That "at the time the complaint of said *Phoenix* and others was filed in said Court of Common Pleas, and at the time the judgment of foreclosure thereon was rendered,

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and at the time the writ to execute the same was issued, and at the time the sale of said lots thereunder was made to said *Ketcham*, the complaint of said plaintiff herein was pending in the said *Marion* Circuit Court, of which said defendants and said *Ketcham* had notice, and the plaintiff further avers that he was not a party to said suit of foreclosure, nor bound thereby."

Fourth. "And for further reply to the *third* paragraph of said answer, the said plaintiff says that at the time the complaint of said *McCarthy* was filed in the Court of Common Pleas of said county, and at the time said judgment of foreclosure was rendered thereon, and at the time the writ to execute the same was issued, and at the time the sale thereunder was made to said defendants, the complaint of the plaintiff herein was pending in the *Marion* Circuit Court, of which the defendants had notice. And the plaintiff avers that he was not a party to said last named proceedings of foreclosure, and was not bound thereby. That said defendants, by virtue of their mortgage from said *Babcock*, represented him, and were bound to pay off and discharge the said mortgage debt to said *McCarthy*, and that their actings and doings in permitting said premises to go to sale under the same, and thereby to acquire a title against the plaintiff, were, and are, a fraud upon the plaintiff."

The defendants, *Francis M. Babcock*, *John Babcock* and *Philip Phoenix* filed a demurrer to said 2d, 3d and 4th paragraphs of the plaintiff's replication, which was overruled by the court and the ruling thereon excepted to.

Publication having been made and proved, as to the unknown heirs of *John D. Phoenix*, they were defaulted, and *R. B. Duncan* was, by the court, appointed guardian *ad litem* for them, and, thereupon, filed his answer in denial of the complaint.

A default was taken against *Melville D., Henry and Emily Babcock*.

The suit was dismissed as to *Springstead*.

The jury, to whom the cause was submitted, found for

the plaintiff the sum of \$984.80. Motion for a new trial by the appellants overruled, and a judgment against *Henry Babcock* on the finding of the jury, and that unless the same should be paid within twenty days, the lots described in the complaint should be sold, &c., to satisfy the same. We are not favored with a brief in the case by the counsel of the appellee.

The first question urged by the appellants for a reversal of the decree of the Circuit Court, arises upon the ruling of that court in overruling the demurrer to the 2d, 3d and 4th paragraphs of the plaintiff's reply to the *second* and *third* paragraphs of the appellants' answer. The *second* and *third* paragraphs of the reply are directed to the *second* paragraph of the answer, which sets up the mortgage by *Henry Babcock* to the appellants, the foreclosure thereof, and the sale of the mortgaged premises by the sheriff to *Ketcham*.

The second reply simply alleges that the mortgage to the appellants was given to secure a pre-existing debt, and that *Ketcham* had notice of the pendency of this suit before his purchase under the mortgage at sheriff's sale.

The question raised by the reply is this, viz: Is the mortgagee of a mortgage taken in good faith to secure a pre-existing debt, regarded as a purchaser for a valuable consideration, and protected as such? The replication under consideration assumes the negative; but the same question has been ruled affirmatively by this court, in the case of *Work v. Brayton et al.*, 5 Ind., 396. *Perkins, J.*, in delivering the opinion of the court in that case, says: "The question whether a mortgagee, in a mortgage given for the security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration, has been decided differently by different courts; and there has been a like diversity of opinion upon the analogous question, whether the holder of commercial paper assigned as collateral security for a pre-existing debt, is to be treated as a holder for a valuable consideration. The latter of these questions this court decided in the affirmative in *Valette v. Mason*, 1 Ind.,

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288; and it would seem that the principle of that case applied to a mortgagee of real estate to secure a like indebtedness, would require that he be regarded as a purchaser for a valuable consideration. * * * If it is not to be so regarded, the titles of purchasers and mortgagees for such a consideration, must be of comparatively little value, as they may, at any time, be unexpectedly overrode by secret invisible liens for unpaid purchase money to some former grantors, or by some other, till then unknown, alleged equitable claims, which might, in their origin, have been without trouble made secure by open, recorded instruments, that would have been notice to all the world. * * * *

"A pre-existing debt is held to be a valuable consideration by *Story*, in the second volume of his *Equity Jurisprudence*, pp. 657, 658, and he cites for the doctrine *Mitford v. Mitford*, 9 Ves., 100, and *Bayley v. Greenleaf*; 7 Wheaton, 46. In vol. 2, pt. 1, p. 73, of *White and Tudor's Leading Cases in Equity*, they say: 'Similar decisions were made in *Richeson v. Richeson*, 2 Grattan, 497, and in *Dey v. Dunham*, 2 Johnson's Chancery R., 182;' though this latter case has not been followed in *New York*. *Kent*, in the 4th vol. of his *Commentaries*, p. 154, approves the doctrine, and expresses the conviction that it rests on grounds that will command general assent. He cites in support of it *Roberts v. Salisbury*, 3 Gill and J., 425, and *Gann v. Chester*, 5 Yerger's Tenn. R., 205."

The argument of the court for the justice of the rule, in the case of *Work v. Brayton et al.*, *supra*, would seem to be peculiarly applicable to the case at bar. Here it is not pretended that the mortgagees had any notice of the alleged fraudulent representations of *Melville D. Babcock* and *Springstead* to *Jordan*, and *Henry Babcock*, the mortgagor, derived his title directly from *Jordan*, and not through *Melville D. Babcock* or *Springstead*. The same principle was again recognized and confirmed in the case of *Wright v. Bundy*, 11 Ind., 398. We think, therefore, that the 2d paragraph of the replication was bad, and the demurrer to it

should have been sustained. Indeed, the complaint is bad, so far as it seeks a lien on the lots as against the appellants' mortgage. The answer, however, goes farther, and shows a foreclosure of the mortgage, and the sale of the lots under it by the sheriff to *Ketcham*. He derives title through the mortgage, and notice to him of the alleged fraud, before his purchase, cannot affect his title. The second paragraph of the answer was, therefore, a valid bar to the suit, as against the appellees, and to the claim of the plaintiff for a lien on the lots for the amount he might recover for the alleged fraud.

If the title had remained in *Henry Babcock*, perhaps, under the averments in the complaint, the plaintiff might have asserted a lien as against him, but that question is not properly before us, and we do not, therefore, decide it.

The *third* paragraph of the replication avers that this suit was commenced before the suit to foreclose the mortgage to "*Babcock & Co.*," and was still pending at the time of the sale to *Ketcham*, who had notice thereof. It also avers that the plaintiff here was not a party to the suit of foreclosure, nor bound thereby. It was not necessary that *Jordan* should be a party to the suit of foreclosure, and he was, nevertheless, bound thereby, because the mortgagees stood in the relation of purchasers for a valuable consideration, and their equity, thereby, had priority to the plaintiff's. The paragraph was clearly bad.

The *third* paragraph of the answer sets up a sale of the lots under a foreclosure of the mortgage to *Margaret McCarty*; and the 4th paragraph of the reply is directed to that paragraph of the answer, and alleges the pendency of this suit at the time of the commencement of that, and at the time of the judgment, foreclosure and sale under that mortgage, and notice to the purchaser; and further avers that the plaintiff in this suit was not a party to said suit of foreclosure, nor bound thereby; and that said appellants, by virtue of their mortgage from said *Henry Babcock*, represented him, and were, therefore, bound to pay off and

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discharge the said mortgage debt. In reference to the latter averment, it may be sufficient to remark that it is not averred in the complaint that *Henry Babcock*, to whom *Jordan* conveyed, agreed to pay the *McCarty* mortgage, but that the alleged promise was made by *Melville D. Babcock*; nor is it averred that any notice of such promise was contained in the deed to *Henry Babcock*, or otherwise given to said appellants before their mortgage was executed. As the *McCarty* mortgage was recorded, they were bound to take notice of its existence. Without an express promise by them, however, to pay it off, they were not bound to do so; but as it was a prior lien on the lots, they were at liberty either to pay it or suffer the consequences of a defeat of their subsequent lien. The mortgage to *Margaret McCarty* was made before *Jordan* acquired his title, by *Johnson*, under whom *Jordan* held. It was prior in time and in right to any claim that *Jordan* could set up against his subsequent vendee, and if *Jordan* wished to protect his subsequent equity against a sale under that mortgage, he should have discharged it. He had the same interest in doing so as the appellants. *Jordan* was not a necessary party to the suit to foreclose that mortgage, as he had conveyed the equity of redemption to *Henry Babcock* before that suit was instituted.

We think that the 2d, 3d and 4th paragraphs of the reply were all bad, and the court, therefore, erred in overruling the demurrer to them.

Several other errors are assigned and discussed in the appellants' brief, relating to the admission and rejection of evidence on the trial, and to the instructions given by the court to the jury, and to instructions asked by the appellants and refused by the court, many of which are well taken; but as they refer to, and involve the same questions discussed on the demurrer to the replies, we deem it unnecessary to notice them further here.

The court below rendered a judgment for the amount found by the jury against *Henry Babcock*. It is not readily

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perceived upon what principle this was done, as the promises and alleged fraudulent representations are claimed to have been made by *Melville D. Babcock*, and not by *Henry*. But as he did not join in the appeal, no question in reference to it is before us, and we, therefore, decide nothing on that subject.

The judgment of the court below is reversed, with costs, as to the appellants, and so far as it makes the judgment against *Henry Babcock* a lien on the lots, and directs their sale, &c. The cause is remanded for further proceedings in the court below in accordance with this opinion.

W. Henderson, T. A. Hendricks and O. B. Hord, for appellants.

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COVENANT FOR RENT.—A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. Page 25.

SAME.—The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee, and the lessor has his election either to sue the lessee on his covenant, or to follow the land in the hands of his assignee. This rule is not changed by the statute of this state regulating the relation of landlords and tenants, (2 G. & H., sec. 17, p. 860.) Page 25.

SAME.—The administrator of a deceased tenant cannot, by selling and assigning the lease, relieve himself from the obligation to pay rent accruing subsequent to the death of his intestate.

MISTAKE OF LAW.—A mistake, purely of law, is no ground of relief in equity, but it may be accompanied by such circumstances as will entitle the party to relief. Page 28.

APPEAL from the *Rush* Common Pleas.

GREGORY, J.—*Carley* sued *Lewis* and *Reeve* on the following promissory note:

"Twelve months after date, for value received, we, or either of us, promise to pay to the order of *Alvin Carley*,

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administrator of the estate of *Samuel Morgan*, deceased, the sum of seventeen hundred and seventy-two dollars and twenty-five cents, without any relief from valuation or appraisement laws whatever.

“(Signed,)

A. LEWIS,

G. W. REEVE.

“November 20, 1857.”

The defendants answered in four paragraphs. Demurrer to each paragraph. The demurrer was sustained to the 2d paragraph, and overruled to the 1st, 3d and 4th. Reply, general denial. Trial by the court, finding for the plaintiff 552 dollars and 66 cents. Motion by the plaintiff for a new trial overruled, and exception taken.

The evidence is in the record.

Lewis owned lands in *Rush* county. On the 14th day of *May*, 1857, by written instrument, he rented these lands to *Samuel Morgan* for three years, beginning on the 1st of *March*, 1857, in which instrument was the following reservation of rent: “For which the said *Morgan* agrees to pay unto the said *Lewis* the sum of twenty-one hundred dollars, as follows, to-wit: seven hundred dollars on the 25th day of *December* of each of the said three years, for which amounts the said *Morgan* has executed his notes unto the said *Lewis*.”

In the fall of 1857 *Morgan* died, leaving two years of the lease unexpired. *Carley* administered on his estate; had the unexpired term appraised, without taking into consideration the rents reserved—supposing, at the time, that *Morgan's* estate was solvent and liable for the two outstanding notes to *Lewis* for the last two years' rent. The unexpired term was appraised, in this view of the case, at thirteen hundred dollars, and sold at public auction, when *Morgan's* personalty was sold, and was bid in by *Lewis* at fourteen hundred and sixty-seven dollars and fifty cents; and for that sum, together with other personal property bid in at the sale, *Lewis* gave the note in suit, with *Reeve* as

his surety. *Carley*, as administrator of *Morgan*, took possession of the leasehold premises in the fall, and sold the growing crop thereon, for the year 1857. The family of the decedent remained on the premises until *March* following. *Lewis* took possession *March* 1, 1858, under his purchase at the administrator's sale, and held during the residue of the term. At the time of the sale, as well as at the time of the appraisement, it was supposed that *Morgan's* estate was solvent, and it had been so advertised by *Carley*, the administrator. The estate turned out to be insolvent, owing to the fact that there were some claims due from the decedent to creditors residing in Kentucky, of which the administrator had no knowledge. There was a note for sixty-two dollars and sixty-three cents, not in dispute, included in the judgment. At the trial, *Lewis* brought into court the two notes for seven hundred dollars each, given for the two unexpired years of the term, and offered to have the same cancelled, which was done, and the finding of the court was for the balance, after deducting these notes. This defense was presented in several forms in the answer, and was properly pleaded, provided the court, under the law, could give to the defendants the relief sought.

A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee. *Van Rensselaer v. Bonesteel*, 24 Barbour's S. C. R., 365; *Vyryan v. Arthur*, 1 Barn. & Cres., 410, (8 En. Com. Law.)

But the appellant contends that these rules have been changed by the statute, and cites the following provision in support of his proposition: "Rents from lands are collected as other debts." (2 G. & H., § 17, p. 360.) This position cannot be sustained. Section 7 of the same act provides that "A conveyance of real estate, or of any interest therein,

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by a landlord, shall be valid without the attornment of the tenant. But the payment of rent by the tenant to the grantor, at any time before notice of sale given to said tenant, shall be good against the grantee." This latter provision would be without meaning, if the legislature intended to abolish the common law rule above stated.

The counsel for the appellant makes the following propositions:

"In order that this judgment be sustained, one of the two propositions following must be true:

"1st. The agreement to pay rent, and giving notes therefor, is a covenant real running with the land, constituting a preferred debt, which has precedence of all others, under all circumstances, under the law of Indiana; or,

"2d. The fact that a tenant's estate is discovered to be insolvent, by his landlord, after he had supposed it was solvent, and had acted upon that supposition, is such a mistake as will require the court, with its chancery powers, to interpose and relieve the landlord, and thereby give his debt a precedence over all others."

Having answered the first proposition in the affirmative, according to the admission of counsel for the appellant, the judgment of the court below must be affirmed.

The administrator of *Morgan* could not, by selling and assigning the lease, rid himself from the obligation to pay the notes from decedent to *Lewis*, for the rent accruing subsequent to the death of *Morgan*.

In the case of *Van Rensselaer v. Platner*, 2 Johnson's Cases, 17, Kent, J., says: "Two questions were raised at the argument in support of the motion:

"1st. That no action lies against the executors for rent accrued subsequent to the death of their testator.

"2d. If it did, that the executors of *Van Rensselaer* have recovered, *quasi* executors, rent accruing since their testator's death.

"With respect to the first question, it appears to me from an examination of the cases, to be a settled rule that cove-

nant will lie on a covenant in a deed against a lessee, notwithstanding a third person be at the time the actual tenant, and the lessor has recognized him as such; and against his executors, notwithstanding he may have assigned in his lifetime, and the rent accrues subsequent to his death. The reason given for the rule is this, that the privity of contract of the testator is not determined by his death, and the executor shall be charged with all his contracts so long as he has *assets*. 8 Mod. 326. In another case, (Cro. Ja. 522,) it is said that in covenants *en fait*, a covenantor and his executors are always chargeable, and that the executors are not chargeable by reason of the privacy of contract, but by reason of the covenant. But though some cases may differ in assigning the reason of the rule, they all concur in the rule itself. There is no instance, however, that I have met with, of a case exactly like the present, where the covenant for rent was upon an estate *in fee*. They are all upon terms for years, and it seems, accordingly, to be severe to apply the rule to the present case; for here the executors, or the personal estate, receive no consideration for the payment of the rent, since, on the death of *Platner*, the estate must have descended to the heirs at law.

“In answer to this objection, I observe, that the responsibility of the executors to pay rent, accruing subsequent to their testator’s death, is not placed upon the ground that they have the fund in hand, but upon the ground of the express covenant of their testator, from which no act that he can do will discharge him, or discharge them, so long as they have *assets*.”

So the lessor has his election, either to sue the lessee on his covenant reserving rent, or follow the land in the hands of his assignee.

Thus circumstanced, this court is not prepared to say that the course pursued by *Morgan’s* administrator, believing as he did, that the estate was solvent, was not the best for the interest of the estate; at least it was not such an abuse of his trust as would prevent a court of equity from reliev-

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ing the parties from the consequences of a mistake as to the solvency of the estate.

It is true that a mistake, purely of law, is no ground of relief in equity, but it may be accompanied by such circumstances as will entitle the party to relief. 1 Story's Eq. Jur. § 184.

We think this case comes within the rule of equity that a mistake of law, accompanied by mutual surprise as to the relative rights growing out of a somewhat complicated transaction, may be the ground for equitable relief, and as the common pleas court, having jurisdiction of the trust, has thought this a case in which the relief ought to be extended, we are not inclined to interfere.

The judgment is affirmed, with costs.

George C. Clark, for appellant.

A. W. Hubbard and *L. J. W. O. Sexton*, for appellees.

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THREE CASES.

CONSTITUTIONAL CONSTRUCTION—TITLES OF LAWS.—The words "subject" and "matters," as used in sec. 19, art. 4 of the Constitution, which provides that "Every act shall embrace but one *subject*, and *matters* properly connected therewith, which *subject* shall be expressed in the title," are as nearly synonymous as possible; the one, "*subject*," being used to indicate the chief thing about which legislation is had, and the other, "*matters*," things which are secondary, subordinate or incidental. Page 81.

SAME.—The evils intended to be prevented by this section were: 1st, the passage of laws under false and delusive titles, whereby members of the Legislature might be deceived into the support of them; and, 2d, the combining together, in one act, of two or more subjects, having no relation to each other, by which means members might be constrained to support measures obnoxious to them, in order to procure such legislation as they wished. Page 82.

SAME.—The insertion in the act to regulate the liquor traffic, of a section conferring upon particular courts jurisdiction of cases prosecuted for its

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violation, (1 G. & H. sec. 14, p. 615,) is not in violation of sec. 19 art. 4 of the Constitution, but is matter properly connected with the subject of the act. *Lauer v. The State*, 22 Ind. 461, overruled.

SAME—SPECIAL LAWS.—A special law, within the meaning of sec. 22 art. 4 of the Constitution, is such an act as at common law the courts would not have taken notice of, unless specially pleaded and proved, as any other fact, and sec. 14 of the liquor law of March 5, 1859, *supra*, which confers concurrent jurisdiction on the circuit and common pleas courts for the trial of offenses under that law, is not special legislation within the prohibition of the Constitution.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—These cases involve the question of the constitutionality of the fourteenth section of what is known as the liquor law of 1859. That section attempts to confer jurisdiction of cases prosecuted for the violation of the act, upon both the common pleas and circuit courts.

The appellant makes two objections to the constitutionality of the section in question, and both are pressed with much zeal, and supported by an argument of great plausibility. We will consider these objections in the order in which they are made.

1. That the section is unconstitutional because the matter embraced in it is not properly connected with the principal subject of the act; and, indeed, forms a distinct subject of itself.

The question thus presented is not here for the first time. In *Thomasson v. The State*, 15 Ind. 449, it was considered in a general way, and the section held to be free from valid constitutional objection. That case was ably argued, and was, evidently, carefully considered. Indeed, six other cases, involving the same question, were decided at the same time. It ought to be stated, however, that the particular argument now under examination may not, in that case, have been brought to the attention of the court. In *Lauer v. The State*, 22 Ind. 461, the ruling was the other way, and upon this point *Thomasson v. The State*, was overruled. The opinion, in the latter case, is very brief, the reasoning unsatisfactory, and we believe that the decision was not generally

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expected by the bar. We think it was not regarded as putting the question fully at rest. Among the first cases which came before the court, as now composed, was *Reams v. The State*, 28 Ind. 111, in which the same question was involved, and the argument now under consideration was pressed. We gave it that careful examination which such a question ought always to receive, and the more because of the previous decisions of the court upon it. The result was, that we held sec. 14 free from conflict with the constitution. Afterward, in *Robinson v. Skipworth*, 23 Ind. 311, we found ourselves again required to examine and interpret that clause of the constitution (art. iv. sec. 19.) In that opinion we expressed more fully than before, our views of the purpose and meaning of the constitutional requirement. Desiring, however, the aid of every argument which might assist us, we have, in these, and several other cases, deemed the question still open, and have delayed this decision in order to give opportunity for the fullest presentation of every consideration which might weigh against the opinion, on this point, expressed by us heretofore. We are now favored with a discussion which, probably, leaves little to be said upon that side of the question, and we find ourselves but confirmed in the opinion expressed in the cases alluded to.

Section 19 art. iv. of the constitution, after having been in force thirteen years, and after having been considered and applied by this court no less than twenty-six times, seems to be as far from being settled in its meaning and application as it was in the beginning. The cases which have not been expressly overruled, and which stand to guide the legislature, and the other courts, seem to us not easily reconcilable with each other, upon any principle. A few cases have been decided here, in the decision of which the court has laid down rules, which, if adhered to, would probably have prevented confusion, but, afterward, cases have been decided in apparent antagonism therewith, but without expressly calling in question the previous rulings,

or giving any reason whatever for the departure from landmarks apparently established after thoughtful and intelligent consideration. Thus, more than once, have salutary and useful measures of legislation been held void, and this provision of the constitution, intended to prevent certain well known practices in legislation, which had grown into a serious evil, became itself a greater curse, we fear, than had been the vices which it was intended to cure. It is time that its purpose and meaning should, if possible, be settled upon principles capable of somewhat general application. In the opinion of Mr. Justice Gookins, in *Beebe v. The State*, 6 Ind. 501, and in *Brandon v. The State*, 16 Ind. 197, *The Bank, &c. v. New Albany*, 11 Ind. 189, and *Robinson v. Skipworth*, *supra*, this has been, to some extent, done. Indeed, if the mischiefs of our previous legislation, which were intended to be remedied by the constitutional provision shall always be borne in mind, and that to prevent those mischiefs was its sole purpose, and the only use to which it can be legitimately applied by the courts, it seems to us that we shall have adopted an easy test of almost every question that can be made upon it, relieve the legislature from that embarrassment which, in a great degree, tends to paralyze its power for good, and vindicate fully, from serious and growing doubt, the wisdom of the restriction.

To say that a matter may not constitutionally find a place in an act, because it more logically belongs to a subject which is different from that which constitutes the principal burden of the act, or that it might itself properly constitute the subject of a separate act, is but to insist that but one *subject*, or matter, may be embodied in a single act. But the constitution does not so require. It authorizes one subject, and any number of matters, provided they have any natural or logical connection with each other in legislation. The words "subject" and "matter," are often used as synonymous. Indeed, in the sense in which they are employed in the constitution, they are as nearly so as it is possible for two English words to be, and both are used simply

to avoid repetition. The only difference between them is created by the offices which they are respectively made to perform in the clause in question. "Every act shall embrace but one *subject*, and *matters* properly connected therewith, which *subject* shall be expressed in the title." Now it is quite evident that the word "subject" is here used to indicate the chief thing about which legislation is had, and "matters," the things which are secondary, subordinate or incidental. The mischiefs intended to be prevented by the section were two. *First*, the passage of any act under a false and delusive title, which did not indicate the subject-matter contained in the act; a trick by which members of the legislature had been deceived into the support of measures in ignorance of their true character. *Second*, the combining together in one act of two or more subjects, having no relation to each other; a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit.

Is the insertion in an act to regulate the liquor traffic, of a section conferring upon particular courts jurisdiction of cases prosecuted for its violation, within any of the mischiefs intended to be prevented? This question can be answered only in the negative, and such an answer conclusively disposes of this constitutional objection.

We happen to have laws in force by the operation of which, when a new offense is created, some one of our courts can take jurisdiction of it. But the existence of these surely cannot render that unconstitutional, which would not be so if they did not exist. The legislature cannot, in such a matter, circumscribe its own power. In the absence of such statutes, the creation of a new offense would beget a necessity for conferring jurisdiction of it upon some court. Can there be a doubt then that the two things are properly connected, as the constitution requires? It really seems that to state the question ought to be sufficient.

2. The remaining objection is that so much of the 14th

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section of the act as confers jurisdiction upon the circuit court is special legislation, and therefore in conflict with sec. 22, art. 4, of the constitution, which provides that special laws shall not be passed "for the punishment of crimes and misdemeanors, &c." and "regulating the practice in courts of justice."

This objection was considered, and deemed untenable, in *Thomasson v. The State*, and upon this point, that case has not been overruled. That opinion was based upon the authority of *Reed v. The State*, 12 Ind., 641. Upon one branch of the objection, *Reed v. The State* is an authority directly in point. Whether, for the same offense, it might be provided that a party might be brought to trial either in the circuit court by indictment, or in the common pleas by information, was, in that case, very fully and satisfactorily discussed by the court; and upon a careful review of the subject, we fully concur in the conclusion which was reached. The other branch of the objection, to-wit: that to confer jurisdiction upon both courts to try offenses under this act only, without giving the like jurisdiction as to all other misdemeanors, is a special law for the punishment of misdemeanors, has not, that we are advised, been directly considered by this court heretofore. It is proper, therefore, that we shall consider it more fully.

1. Let us test the proposition by the consequences which must necessarily flow from it, if we give it our assent. If it be special legislation to confer the jurisdiction, only as to this particular class of misdemeanors, without also embracing all other misdemeanors, it is the same thing to annex different penalties to different misdemeanors; for the penalty inflicted, as well as the mode, or *forum*, in which it shall be tried and adjudged, is comprehended by the language of the restriction, "*punishment of misdemeanors.*" Surely the penalty imposed is the very essence of punishment, and cannot be excluded. So the first consequence would be to sweep from the statute book every vestige of existing law for the punishment of misdemeanors. The next would be, that all

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classes of such offenses must be punished to the same extent, or not at all; and it is not easy to say which of these alternatives ought to be preferred. So, too, with felonies; and treason against the state, which aims at the destruction of government, and involves the wholesale slaughter of the people, is to be punished only to the same extent as the larceny of a penny!

But this mode of reasoning, though legitimate, is not conclusive; for a human constitution of government is necessarily imperfect, and may even drive us into absurdities—nevertheless, we have no authority to set it at naught. The remedy is not in the hands of the court.

† What is a *special* act? It is such as at common law the courts would not notice, unless it were pleaded and proved, like any other fact. This is suggested in argument on behalf of the appellant, and we think that the proposition is correct. The distinction between general and special statutes was well known to the common law, though sometimes a question of great nicety, and it is in accordance with a well-established principle to assume, that the constitution in using the terms intended them to be understood in the sense which was at that time recognized by the courts. Now we apprehend that it will be impossible, anywhere, to find a decision by any respectable court, to the effect that an act is required to be pleaded which confers jurisdiction for the punishment of a particular misdemeanor, in all cases, though the court thus empowered could not take cognizance of other misdemeanors.

† In *Heridia v. Ayres*, 12 Pick., 844, it was held that an act to regulate the pilotage of Boston harbor would be judicially noticed, because it was alike binding upon all persons who should violate it. In *Lovell v. Sheriff of London*, 15 East, 320, judicial notice was taken of an act concerning sheriffs, though the point had in earlier times been ruled the other way, upon the ground that sheriffs were a species of persons of a general class, to-wit, officers. But we need not extend this opinion by a further reference to the cases. Here all persons are bound by this law; and all, without distinc-

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tion, who become amenable to its penalties, are liable to be tried in either court. As to the persons upon whom it operates, it could not be more general, and as to the jurisdiction, it is as general as it is relative to the penalty which it imposes. The act creates a class of offenses belonging to that grand division of offenses known as misdemeanors. This class is divided by the act itself into several species of offenses. So we have in the act the elements necessary for classification—as genus, species and individuals—according to Coke in *Holland's* case (4 Rep., 76,); and the jurisdiction is not merely of a species, which, according to that case, would make it special, but of the whole class or genus, which makes it general.

The judgment is affirmed, with costs
J. W. Gordon, for appellant.

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CONSTITUTION—LIQUOR LAW.—Section 14 of the Liquor Law of 1859, (1 G. & H. 614) which confers jurisdiction on the grand jury and circuit court for the trial of offenses arising under that law, is not within the prohibition of the constitution against special legislation, and is properly connected with the subject matter of the act, and embraced within its title.

SALES ON SUNDAY.—The act does not provide any penalty for sales of liquor made on *Sunday*, by a person having a license to sell, and hence, though the license does not extend to sales made on that day, no prosecution will lie for such sales.

APPEAL from the *Marion* Circuit Court.

ELLIOTT, J.—Indictment for retailing intoxicating liquor on *Sunday*.

The indictment charges “that *John Hingle*, on the 21st day of *February*, 1864, at the County of *Marion*, &c., which said 21st day of *February* was *Sunday*, did unlawfully sell one gill of intoxicating liquor to one *Oliver J. Wallace*, for the price of five cents.” There is no averment that the defendant was not licensed, according to the provisions of the act, to sell, &c. A motion to quash the indictment was made and overruled, to which the defendant excepted.

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Plea, not guilty. A jury being waived, the issue was tried by the court, who found the defendant guilty, and assessed his fine at fifteen dollars. Motion for a new trial overruled. The defendant then moved the court in arrest of judgment, which motion was also overruled, and properly excepted to. Judgment on the finding.

Two questions are urged for the reversal of the finding and judgment of the court below. They are :

"1st. The circuit court had no jurisdiction of the offense charged in the indictment."

"2d. The indictment charges no criminal offense against the defendant below, of which the grand jury that found it had the right to take cognizance."

The argument in favor of the *first* proposition is, that the 14th section of the act of 1859, "to regulate and license the sale of spirituous, vinous, malt and other intoxicating liquors," &c., (see 1 G. & H. 614,) conferring jurisdiction on the grand jury and the circuit court, in cases arising under the provisions of the act, is unconstitutional and void. *First*, because that section is a *special law*, and therefore obnoxious to the 22d section of the 4th article of the constitution of the state. And, *second*, that said section 14 is not embraced in the subject of the act, nor properly connected therewith, and is, therefore, in violation of the 19th section of the 4th article of the constitution.

The *first* reason urged in argument has been deliberately considered and passed upon by this court in the case of *Hingle v. The State*, at this term, (*ante*, p. 28,) in which it is held that the section of the statute referred to is not a "*special law*," within the meaning of the 22d section of the 4th article of the constitution. We also held, in the same case, and also in the case of *Reams v. The State*, 23 Ind., 111, "that the 14th section of the act under consideration is properly connected with the subject matter of the act, and does properly confer jurisdiction on the grand jury and circuit court," to which rulings we adhere. As to the latter question, see also *Robinson v. Skipworth*, 23 Ind. 311.

2. The remaining question to be considered is, Does the indictment charge a criminal offense against the defendant of which the grand jury or Circuit Court had the right to take cognizance?

It is insisted by the defendant's counsel, in an able argument, that, although the statute of 1859, before referred to, does not authorize a person licensed under its provisions to sell intoxicating liquors on *Sunday*, no penalty is imposed thereby for such sales, on persons so licensed. The question is not a new one in this court. It has been twice passed upon and ruled differently. In the case of *Thomasson v. The State*, 15 Ind. 449, the defendant was indicted for retailing without license. PERKINS, J., in deciding the case, took occasion to review many of the provisions of the act. The question presented here did not properly arise in that case, but it was nevertheless discussed and passed upon. The reason given for so doing, is that questions almost without number were raised and ably discussed; some of which did not legitimately arise in that case, but did in others then pending before the court, and all of which would have to be sooner or later decided. The court, in that case, held that as by the exception contained in the 8th section of the act, the license did not extend to, or authorize the sale of intoxicating liquors on *Sunday*, the 10th section imposed a penalty for selling on that day, as well against those licensed, as those not licensed, under the law. This ruling was but an *obiter dictum*, but it was evidently intended as the mature opinion of the court, and was so regarded and acted upon by the lower courts, and under it the indictment and conviction were had in the present case. The opinion, thus expressed, in *Thomasson v. The State*, was afterward affirmed by the court in the case of *Sohn v. The State*, 18 Ind. 389, by PERKINS, J., and in *The State v. Thomasson*, 19 Ind. 99, by HANNA, J. But these cases were all overruled in the more recent one of *Hingle v. The State*, 22 Ind. 462, in which it is said, "There is no

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penalty in the act, upon a person being licensed according to the act, for selling on *Sunday*."

The question has not before been presented to the present judges of this court, and as the previous rulings upon it have not been uniform, we have deemed it proper to give to the statute a careful examination.

Sections 3, 4, 5, 6 and 7, of the act, authorize the granting of license to retail intoxicating liquors, and prescribe the mode of procuring the same.

The 8th section is as follows: "A license granted under the provisions of this act shall not authorize the person so licensed to sell or barter any intoxicating liquors on Sunday, nor to any person under the age of twenty-one years, nor to a person or persons in a state of intoxication, nor upon the day of any state, county, township, or municipal election, in the township or city where the same may be holden."

Sections 9, 10 and 11, prescribe the penalties for violations of the provisions of the act, and if any penalty is provided for selling intoxicating liquors on Sunday, it must be found in one of these sections.

Section 9 enacts a penalty against any person who shall knowingly sell, &c., any intoxicating liquor to any person who is in the habit of being intoxicated, after notice of such habit. No other offense is created, or penalty provided, by that section.

"Sec. 11. If any person shall sell, barter or give away, any intoxicating liquor to any person under the age of twenty-one years, or to any person at the time in a state of intoxication, the person so offending shall be fined not less than five, nor more than one hundred dollars," &c. It is evident that no penalty for selling on Sunday is provided in this section; and if it exists at all, it must be found in section 10, which is as follows: "Any person not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any intoxicating liquor in a less quantity than a quart at a time, or who shall sell or

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barter any intoxicating liquor to be drank, or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be fined," &c. In the case of *Thomasson v. The State*, and the other cases in accordance therewith, *supra*, it was held that this section imposed a penalty for selling at retail on Sunday, against persons licensed according to the provisions of the act.

It is not claimed by counsel that the license authorized appellant to sell on Sunday, as under section 8, the license does not cover sales made on that day; but it is insisted that section 10 does not impose a penalty on persons *licensed* according to the provisions of the act, for such sales on Sunday; and we think the position is sustained by a fair construction of that section.

This view is supported by reference to the *first* section of the same act, which provides, "That no person shall sell or barter, directly or indirectly, any intoxicating liquor by a less quantity than a quart at a time, within this state, without first procuring from the board of commissioners of the county in which such liquor or liquors are to be sold, a license as hereinafter provided; nor shall any person, without first having procured such license, sell or barter any intoxicating liquor to be drank, or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging." Passing thence to the 10th section, and comparing its phraseology with the *first*, it seems clear to our minds that the penalty imposed by it has reference only to the sales, &c., inhibited by the *first* section. A comparative analysis of the two sections will serve to illustrate the position.

Sec. 1. "No person shall sell," &c., "any intoxicating liquor by a less quantity than a quart at a time, without having first procured a license," &c.

Sec. 10. "Any person, not being licensed according to the provisions of this act, who shall sell," &c., "any intoxicating liquor in a less quantity than a quart at a time, shall be fined," &c.

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Sec. 1. "No person, without having first procured such license, shall sell," &c., "any intoxicating liquor to be drank, or suffered to be drank, in his house," &c.

Sec. 10. "Any person, not being licensed," &c., "who shall sell or barter any intoxicating liquor, to be drank, or suffered to be drank, in his house," &c., "shall be fined," &c.

Two classes of vendors of intoxicating liquors are contemplated by the act, the one licensed, and the other not licensed, and the penalty provided in the 10th section is against those of the class *not* licensed, and hence the language used therein, "Any person *not being licensed* according to the provisions of this act," &c.

Again, if the penalty provided in the 10th section extends to sales on Sunday by persons licensed, it also, equally, covers sales made by that class of persons to minors, and persons in a state of intoxication. But section 11th expressly enacts a penalty in the latter cases, which would seem to show that the legislature did not intend that the penalty in section 10 should apply to any of the cases enumerated in section 8, as forming exceptions to the operation of a license. In looking to the various provisions of the act, a penalty against selling on Sunday might be naturally looked for in connection with the 11th section, but, if so intended, it was omitted by the draftsman.

The indictment in the case before us did not contain the averment that the defendant was not licensed according to the provisions of the act, and under the view we have taken of the statute it was, for that reason, bad, and the motion to quash should have been sustained. And, as it was admitted on the trial that the defendant at the time of the sale charged in the indictment was regularly licensed, under the provisions of the law, the finding in the case should have been for the defendants.

The judgment is reversed, and the cause remanded, with instructions, to the Circuit Court to quash the indictment.

J. W. Gordon, for the appellant.

BEAVER AND WIFE v. TRITTIPO.

MISTAKE—SPECIFIC PERFORMANCE.—Suit by A. and wife against B., for the partition of lands. The complaint alleged that A. was entitled in his own right to the undivided four-elevenths, and his wife to one-eleventh of the lands, and the defendant B. to the remaining six-elevenths. Answer by B., that the parties had before suit mutually agreed to a partition, and that the plaintiffs, under the name of A., had in pursuance of such agreement executed and delivered to the defendant B. a bond, by which they bound themselves to convey to him a certain portion of said lands, and that he B., had made a like bond to the plaintiffs, by which he agreed to convey to A. the other part of said lands; that each took possession of their separate tracts, and that defendant had made improvements; that at the time stipulated, he had made and tendered a deed to A. for the land so set apart to him, and demanded of him a deed for the land agreed to be conveyed to him, defendant; that A. refused to accept the deed, or to perform the obligations of his bond to defendant. Prayer, that a specific performance be decreed against the plaintiffs. Reply, that the parties had agreed to have two persons, selected by them, make partition of the land between them, and to abide their determination; that the persons so chosen valued two of the tracts of land at \$3,870, and the two remaining tracts at \$2,400, and set apart to plaintiffs the lands so valued at \$2,400 as equal to five-elevenths of the whole, and to the defendant the other lands, valued at \$3,870, as equal to six-elevenths of the whole; that by such division plaintiffs received lands worth less by \$222 70 than their proper share, and defendant a like amount more than his proper share; that plaintiff, A., protested at the time that there must be some mistake, but did not discover it until after the execution of the bonds referred to in the answer, and that B. then refused to correct the error. The court decreed a specific performance of the bond against A. and wife, though the bond did not purport to be executed by the wife.

Held, That as there was no admixture of fraud or imposition in the transaction, and no taking unawares, or want of knowledge of the facts, save the fact of the error in calculation, of which the party complaining had doubts at the time, and was put upon inquiry, it would be encouraging negligence to relieve against the mistake.

Held, also, that mistake or ignorance of facts in parties is a proper subject of relief only where it constitutes a material ingredient in the contract, and disappoints the intention of the parties by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, lays no foundation for equitable interference.

Beaver and Wife v. Trittipa.

Held, also, that the court below erred in decreeing a specific performance of the bond against the wife of A., as the bond set up in the answer contained no obligation to be performed by her, and such a decree operated to divest her of a portion of her estate, and transfer it to the husband.

Held, also, that the answer setting up a bond not purporting to be executed by the wife, was no bar to the action as to her, and the demurrer to the reply should have been sustained to the answer.

APPEAL from the *Hamilton* Circuit Court.

FRAZER, J.—Petition for partition, alleging that the plaintiff, *John Beaver*, is seized in fee of four-elevenths, and the plaintiff, *Desire Beaver*, wife of *John*, of one-eleventh, and the defendant of six-elevenths, undivided, of certain lands. Answer, that the parties had before mutually agreed upon partition, and that the plaintiffs, under the name of *John Beaver*, had, in pursuance of such agreement, executed and delivered to the defendant a bond, by which they bound themselves to convey to the defendant a certain portion of the lands held in common, on or before *September 1, 1861*, and the defendant had made a like bond to the plaintiffs, whereby he bound himself to convey to the plaintiff, *John Beaver*, on the same day, the other part of said lands; that each took possession of the lands so to be conveyed to him; that the defendant has made lasting and valuable improvements on his portion; that at the time stipulated in the bonds, he tendered a conveyance to the plaintiff, *John*, according to the condition of his bond, and demanded from the plaintiffs a like conveyance; that the plaintiffs refused to perform, or to accept the conveyance tendered by the defendant. The deed from the defendant to the plaintiff, *John*, was brought into court for the plaintiffs, and a copy of the bond alleged to have been given by them was annexed to the answer, and made part of it. This bond is executed by *John Beaver*, and purports, in the body of it, to bind him alone; but it specifies that he is to convey to the defendant five-elevenths of the lands. A specific performance is prayed against the plaintiffs. Reply, 1st. General denial. 2d. That the parties being desirous of making partition, and being unable to agree thereon, agreed orally that two neighbors should examine

the lands and ascertain the value of the respective tracts, and determine in what manner partition should be made, and the parties would abide by such determination; that the neighbors so chosen valued two tracts of the land at \$3370, and the two remaining tracts at \$2400, and declared to the parties that the plaintiffs should take the lands so valued at \$2400, and that the same would be equal in value to five-elevenths of the whole, and that the defendant should take the two tracts valued at \$3370, and that the same was equal in value to six-elevenths of the whole; that by such partition the plaintiffs would receive lands worth \$222 70 less than their proper share, and the defendant would receive lands worth a like sum above his proper share; that the error of the two neighbors was a mistake, made innocently; that the plaintiff, *John*, protested at the time that he thought there must be a mistake, and that the lands allotted to the plaintiffs were not equal to their share; and that the bond set up in the answer was made under the mistake aforesaid; that the plaintiffs, shortly after executing the bond, discovered the mistake in calculation, notified the defendant thereof, and desired it to be corrected, which the defendant refused, &c. A demurrer was sustained to the second paragraph of the reply, and the plaintiffs excepted.

Was the second paragraph of the reply good? The reply seeks relief against the bond on the ground of mistake, without the slightest admixture of imposition or fraud. The mistake alleged was one of computation, made by two friendly neighbors, mutually chosen by the parties. There was no taking unawares, no hasty action, under circumstances not favorable to deliberation. The parties knew the lands, and must be presumed to have had a knowledge of the value of the respective tracts. In short, no fact was unknown to them, save the single circumstance that a mistake had been made in the mathematical process of computing the sums which would constitute the respective shares of the parties, in the aggregate sum at which the whole lands were valued. It seems, too, that the appellants doubted the correctness of

the computation when the bond was executed; they were thus upon inquiry. Certainly reasonable diligence, if used, must have discovered the mistake at once. To relieve now, would be but to encourage negligence. Indeed, it is not easy to perceive how the alleged mistake could be very material in any event. It was land, not money, which the parties were seeking to divide, and whether a value was fixed upon the lands, expressed in dollars, or not, was not an essential thing. The end to be accomplished was that the lands should be so parted that the portion assigned to the plaintiffs should, in value, bear that relation to the whole which five does to eleven. Now, if the friends who acted between the parties had estimated the lands allotted to the plaintiffs at \$222 more, and those allotted to the defendant at \$222 less than they did, then there could have been no complaint; and yet the result would have been precisely what was reached. The observations of Mr. Justice STORY seem so applicable to the case in hand, that we adopt them: "Mistake or ignorance of facts in parties is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties, and disappoints their intentions by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*." 1 Eq. Jur. § 151.

The court decreed a specific performance of the condition of the bond, as well against *Desire Beaver*, as against *John*, her husband, and it is alleged that, as against *Desire*, this decree was erroneous.

The averment in the answer is that both plaintiffs executed the bond, "by and under the name of *John Beaver*." The bond itself, which constitutes a part of the answer, contains

no obligation to be performed by *Desire*; it does not profess to bind her in any respect; it seems on its face to be the individual bond of *John Beaver*, and the deed from the defendant, brought into court for the plaintiffs, names *John Beaver* alone as the grantee therein. The effect of the decree is not only to accomplish a partition of the lands according to agreement, but to divest a portion of the wife's estate, and transfer it to her husband—to give her one-eleventh, instead of one-fifth, of the lands thus apportioned to herself and her husband. This will not do. If it be granted that the bond alluded to binds her, still it can, by no possible construction, operate to transfer to her husband lands belonging to her. But we do not perceive how she can be bound by the bond. Grant that she executed it. What then? It did not bind her to convey; it provided only that her husband should convey, and upon his doing so, the contract would be performed. The bond must be construed for itself; its import must be deduced from the language employed in it, and nothing can be added thereto by the averment in the answer. We give the defendant the benefit of his bond; upon this he insists, but we cannot give him more.

But we cannot understand how the bond, not being obligatory upon the plaintiff *Desire Beaver*, could be set up as a sufficient answer to the complaint, so far as she was concerned. Not purporting to be executed by her, it must be held for nothing as against her, and it was not necessary that she should deny its execution under oath. *Peoria, &c., Ins. Co. v. Walser*, 22 Ind. 73. The averment in the answer that she executed the bond, is inconsistent with the bond itself. As the answer was made to the whole complaint, and was not sufficient as such, the demurrer should have been carried back to the answer, and sustained to it.

It is due to the learned judge who tried the cause below to say, that we see nothing in the record to indicate that his attention was called to the insufficiency of the answer.

The judgment is reversed, with costs, and the cause re-

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manded, with directions to set aside all proceedings subsequent to the demurrer, and to sustain it to the answer.

E. S. Stone, for appellant.

D. Moss, for appellee.

 FOX v. REYNOLDS.

NEW TRIAL.—CUMULATIVE EVIDENCE.—Under our statute, a party to an action may testify in his own behalf, but he is not bound to resort to his own evidence, and may have a continuance for an absent disinterested witness to material facts, known to himself; but if he becomes a witness for himself, he stands as all other witnesses, except as to his credibility, and is not entitled to a new trial for newly discovered cumulative evidence of facts testified to by him on the trial.

APPEAL from the *Tippecanoe* Circuit Court.

GREGORY, J.—*Reynolds* sued *Fox* on two promissory notes; one for \$3628 88, and the other for \$2888 91, made by *Fox* to *J. L. Reynolds & Co.*, and by them assigned to the plaintiff below.

An answer in five paragraphs was filed. The fifth avers, substantially, that the parties had been in partnership for several years, under an oral agreement, and had large transactions in the purchase, packing and sale of pork, &c., at Lafayette, Indiana, of which a pretended statement had been made, on the basis of which, upon accounts wholly kept and rendered by *Reynolds*, the notes had been given; that the accounts as rendered were erroneous in large amounts, which are specified, for improper charges made by *Reynolds*, but which *Fox*, relying upon *Reynolds* to do right, did not examine, &c. Among the items which *Fox* alleged *Reynolds* had improperly charged, was \$3000 for the use of his pork house, when it should have been \$2000; and sundry sums of excessive interest, in all some \$1500. That *Reynolds* had improperly

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omitted to credit *Fox* \$1000 per year for four years services in the pork packing business, which he had rendered for the firm, and \$1000 for services in the cattle business, and \$1500 for some partnership property sold and not accounted for by *Reynolds*. Reply: 1st, general denial; 2d, that all the matters and things therein contained were fully settled, and on such settlement being made, the notes, in plaintiff's complaint named, were given in consideration thereof. Issues of fact were joined, and the cause tried by a jury; verdict for the plaintiff for \$2624 33; motion for a new trial on the ground of newly discovered evidence overruled, and appellant excepted. The evidence is in the record.

Reynolds was called as a witness by *Fox*. *Fox* testified as a witness on his own behalf. Among other things, he said: "About the time we were going into partnership, *Reynolds* met me at *Barbe's* corner, *Lafayette*, and asked me how I would like to go into partnership. He said he had bought the Mammoth Pork House, as it was called, at sheriff's sale. I think he was to charge \$500 for the pork house all told. I told him my services would be worth \$1000. I told him I had'n't much money; he said money could be raised. I told him I must have the whole control of the packing business; he then said go ahead, which I did.
* * * * * There was never any other conversation between me and *Reynolds* about the partnership."

The affidavits in support of the motion for a new trial are as follows:

"STATE OF INDIANA, TIPPECANOE COUNTY, ss:

<i>John L. Reynolds,</i>	} Tippecanoe Circuit Court, October Term,
v.	
<i>Jonathan Fox.</i>	

1862.

Noah Washburn, a competent, disinterested witness, being duly sworn in open court, on his oath says, that in the year 1851, about the time that plaintiff and defendant were going into the business of packing pork in the city

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of *Lafayette*, he, the said *Washburn*, was present at a conversation between the said parties, which took place on the side-walk near *Barbee's* corner, at the intersection of Columbia and Ohio streets, in said city; that in said conversation, the said plaintiff, *John L. Reynolds*, told *Fox* he had bought the Mammoth Pork House, and after some other conversation, *Reynolds* proposed to *Fox* to go into business with him in the packing business, and *Fox* inquired of *Reynolds* what rent he would charge for the pork house and packing establishment, and *Reynolds* replied that he would charge \$500. *Fox* then replied that his services would be worth \$1000 a year, and that he (*Fox*) must have the entire control and management of the business; to which *Reynolds* replied, "I will do it, and you may go on and fix up." Said *Washburn* further says he never disclosed to the said *Fox* that he had heard said conversation, until after supper time on the night of *Monday, November 3d, 1862*, after *Fox* had informed affiant that the jury in said cause had retired to consult of their verdict.

NOAH WASHBURN.

Subscribed and sworn to, in open court, *November 5th, 1862*.

W. R. ELLIS, Clerk."

"*Jonathan Fox*, the above named defendant, being duly sworn in open court, on his oath says, that by his contract with the plaintiff, in relation to the pork packing business, before entering into that business, the said *John L. Reynolds* was to charge for the rent of the pork house only the sum of \$500 per year, and he, the said defendant, was to be paid for his services for the partnership, the sum of \$1000 per year; that up to the time the exhibits, accompanying the answer of said *Reynolds* to the interrogatories filed in this case by the said *Fox*, were filed, he was wholly ignorant of the fact that the said *Reynolds* had charged \$1000 per year for the rent of the pork house, for three of the years of said partnership, and he was also wholly ignorant of the fact that said *Reynolds* had omitted

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to give said *Fox* credit for his services, as he had contracted to do. And further, said affiant was wholly ignorant of the fact that *Noah Washburn*, or any other witness, was present and had heard the contract between the parties, until after the jury in said cause had been charged, and had retired to consult of their verdict, when he was informed by said *Washburn*, for the first time, that he was present and heard said contract. Said affiant has examined the foregoing affidavit of said *Washburn*, and says that the facts in reference to the conversation therein referred to, are, as he believes, true, and he can now prove said facts by said *Washburn*. Wherefore, the said *Fox* asks the court to grant him a new trial, on account of newly discovered evidence.

JONATHAN FOX.

Subscribed and sworn to, in open court, *November 5th, 1864*,
W. R. ELLIS, Clerk.

The circuit court overruled the motion, on the ground that the newly discovered evidence is merely *cumulative*.

It is urged by the counsel for the appellant, that the legislature having changed the law prohibiting parties from being examined as witnesses, it becomes necessary that this court should examine and determine whether such change does not require an exception to be made to the rule as to granting new trials for *cumulative* evidence,—the exception covering all cases where the only evidence given is that of the parties.

And it is claimed that the equity practice will justify this court in making such an exception.

In *Livingston v. Hubbs*, 3 Johns. Ch. Rep. 124, which was a bill for review in equity, CHANCELLOR KENT says: "The nature of the newly discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact. In *Taylor v. Sharp*, 3 P. Wms. 371, the Lord Chancellor spoke of such new matter as a receipt release, &c., and observed, that unless the relief was confined to such new matter, it might be used for vexation and

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oppression, and for the cause never to be at rest; and in a case already referred to, LORD ELDON observed, that a party was not, indeed, bound to know every thing which he could have discovered; for instance, he might not be held bound to look into a box for instruments which no human prudence would have suggested. The language of these cases shows strongly the nature and strictness of the rule as to newly discovered proof."

In the case of *Head v. Head*, Adm'r, 3 Marshall's Ky. Rep. 112, the court say: "It is well settled that no review ought to be granted of a fact formerly in issue, on account of evidence newly discovered, unless that evidence be in writing or record, and does not consist in *swearing only*. *Respass, et al. v. M'Clanahan*, Hardin R. 342."

In the case of *Southard et al. v. Russell*, 16 Howard 547, NELSON, J., says: "The rule, as laid down by CHANCELLOR KENT, 3 J. Ch. 124, is, that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. 3 J. J. Marsh. 492; 6 Madd. 127; Story's Eq. Pl. § 413."

"The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to tamper with witnesses for the purpose of supplying defects of proof in the original cause. A distinction has been taken where the newly discovered evidence is in writing, or matter of record. In such case, it is said, a review may be granted, notwithstanding the fact to which the evidence relates may have been in issue before; but otherwise, if the evidence rests in parol proof." 1 Dev. & Batt. 108, 110.

In the light of these authorities, we are forced to the conclusion that a bill for review in equity, for newly discovered evidence, could not be maintained on the ground disclosed in the affidavits of *Washburn* and *Fox*.

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The rule at law is admitted by counsel to be against the appellant, but we are asked to make a new rule, or rather an exception to the old rule. There is no authority for this to be found in any of the states in which the same rule prevails as in this, as to the competency of the parties to a suit to testify in their own behalf; and we do not think reason and sound policy require of us to make such a ruling in the case in judgment.

We think the sound exposition of the statute is, that although "any person a party in the action *may* testify in his own behalf," he is not bound to resort to his own evidence, and may have a continuance for an absent disinterested witness to material facts, known to himself; but if he becomes a witness for himself, he stands as all other witnesses, except as to his credibility, and the same consequences flow therefrom, with such modifications as may arise from the credit to be given to him. Any other construction would enable a party to experiment by first offering himself as a witness, and then, in case the jury disbelieved him, look about with increased diligence for newly discovered *cumulative* evidence.

The case at bar does not commend itself very strongly to our favorable consideration. There is a great want of diligence on the part of *Fox*; he first allows important stipulations in his contract with *Reynolds*, involving thousands, to rest in parol; he does not seem to have retained a very clear recollection of them himself; he makes an important settlement, involving the same items, without examination; he executes his notes for a large balance found due against him, and he forgets the important fact that *Washburn*, a disinterested witness, was present when he made his contract.

To authorize a new trial under such circumstances, the newly discovered evidence ought to be very controlling in its character, and free from any legal objection.

The judgment below is affirmed, with two per cent. damages and costs.

Rawlings v. Fisher.

D. Turpie and Huff & Jones, for appellant.

D. Mace, W. C. Wilson, H. W. Chase and J. A. Wilstach,
for appellee.

RAWLINGS v. FISHER.

PROMISSORY NOTE.—*A* sued *B* upon a promissory note given by him to *C*, and transferred by delivery to *A*. Answer, that *B*, desiring to purchase a certain tract of land of *D*, who was unfriendly to him, procured *C* to make the purchase in his own name, while *B* went upon the notes given for the purchase money, ostensibly as the surety of *C*. In execution of the agreement, *C* conveyed the land to *B*, the latter executing his notes, corresponding to the notes already given by *C* to *D*, upon which *B* was surety, it being at the time agreed that *C* should deliver *B*'s notes to *D*, and take up those originally given; that *C*, in violation of the agreement, had assigned the notes of *B* to the plaintiff for his own debt, while *B* had been compelled to pay the notes given to *D*, upon which he was surety.

Held, that as the note sued on was not payable in a bank in this state, it was subject to whatever defense, or set-off, the maker had, before notice of assignment, against the payee.

Held, also, that the agreement set up in the answer did not vary the terms of the written contract, but went to the consideration of the note, and to show the relation of the joint makers to *D*, the payee, which might be done by parol evidence, even if the legal effect of the writing was changed thereby.

Held, also, that in this class of cases circumstances, tending to show knowledge, in the absence of fraud, are not equivalent to notice of assignment. The burden of showing notice is on the plaintiff.

APPEAL from the *Howard* Common Pleas.

GREGORY, J. *Fisher* commenced an action against *Rawlings*, and one *John D. Kirkman*, on the following promissory note:

“*Kokomo, Ind., December 4th, 1862.*

“On or before the 29th day of *November, 1863*, for value received, I promise to pay *John D. Kirkman*, or order, the sum of one hundred dollars, without relief from valuation laws.

[Signed]

“*WILLIAM H. S. RAWLINGS.*”

The complaint avers that the payee assigned the note to the plaintiff, by delivery.

The appellant answered in two paragraphs.

1. That he gave the note, and another note of the same date, payable on the 29th day of *November*, 1864, for \$65, to defendant *Kirkman*, to secure the purchase money of the undivided one-seventh of certain real estate, describing it; that on the day of the date of the note, *Kirkman* conveyed the land to *Rawlings*, by quit claim deed; that prior thereto, to-wit, on, &c., the defendant *Kirkman*, purchased the land of one *Sarah Small*, for the same consideration, secured by two notes given to said *Sarah* by *Kirkman*, with *Rawlings* as his surety—the one for \$100 of date *November 29th*, 1862, payable twelve months after date, and the other for \$65, of same date, and payable two years after date; that at the time *Rawlings* purchased the land of defendant *Kirkman*, and at the time of receiving a conveyance therefor and the giving of the notes, it was agreed, and a part of the consideration of the purchase, that *Kirkman* should deliver the notes of *Rawlings* to the said *Sarah*, and lift from her and cancel, the note so given to her by *Kirkman*, with *Rawlings* as surety, and that the note sued on was executed under that agreement; that at or about the maturity of the note for \$100, given to *Small*, a copy of which is filed, the defendant *Rawlings* fully paid the sum therein secured, to *Small*, and that *Kirkman* wholly failed and refused to perform his contract to substitute the notes so given him by defendant *Rawlings*, for those so given to said *Sarah*, but, on the contrary, transferred the same to the plaintiff, by way of security for money advanced to him by the plaintiff. Wherefore the defendant *Rawlings* answers, by way of set-off to the note sued on, &c., the payment by him of said \$100 to *Small*.

The note referred to in the answer, is as follows :

“ *November 29th*, 1862.

“Twelve months after date, for value received, we or

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either of us, promise to pay *Sarah Small*, one hundred dollars, without relief from valuation or appraisement laws.

"[Signed]

"JOHN D. KIRKMAN,
W. H. S. RAWLINGS."

2. That in *November, 1862*, the defendant *Rawlings* and *Sarah Small* not being on friendly terms, and, as he learned, she being unwilling to sell him the land described in the first paragraph of the answer, and the defendant *Rawlings* being anxious to acquire title to the land, retained and employed the defendant *Kirkman* to purchase of *Small* the land for him; it being further agreed between *Rawlings* and *Kirkman*, that the title therefor should be made to *Kirkman*, that *Small* might not know that defendant *Rawlings* was really the purchaser, and that the notes to be given to *Small* for the deferred payments—as *Kirkman's* notes alone for the deferred purchase money, might not be acceptable to and received by *Small*—should be executed by *Rawlings* along with *Kirkman*, ostensibly as *Kirkman's* surety; that in pursuance of the agreement, *Kirkman*, on, &c., purchased the land of *Small* for \$265, paying her \$100 in hand, and for the deferred payments executed to her his two notes, with *Rawlings* ostensibly as surety, the one for \$100, payable twelve months after date, the other for \$65, payable two years after date, and received from *Small* a deed for the premises; that a few days thereafter, to-wit, on, &c., in pursuance of the previous agreement, *Kirkman* conveyed the land to *Rawlings*; that *Rawlings* paid *Kirkman* the \$100 so paid by *Kirkman* to *Small*, \$20 for his services in purchasing the land, and gave him his two notes of like amounts, and payable at the same times as those given to *Small*, upon and with the express agreement that *Kirkman* should transfer and deliver them over to *Small*, for those then held by her, which *Kirkman* was to lift and cancel; that *Kirkman* failed to substitute the notes so given by *Rawlings* to him, for the notes so held by *Small*, and failed to lift the same from her, but, on the contrary, transferred the

notes so given to him by *Rawlings* to the plaintiff, as collateral security for money advanced by the plaintiff to him, and that thereafter, at the maturity of the note so given by *Kirkman* and *Rawlings* to *Small*, for \$100, a copy of which is appended to the first paragraph of the answer, the defendant *Rawlings* was compelled to, and did, pay the note for \$100 to *Small*, *Kirkman* being wholly insolvent and unable to pay the same or any part thereof, wherefore the consideration of the note sued on has wholly failed.

The appellee filed a demurrer to each paragraph of the answer, the court sustained the demurrers, and the appellant excepted.

The plaintiff dismissed the action as to defendant *Kirkman*, and the court rendered final judgment against *Rawlings* for the amount secured by the note.

The rulings of the court below, on the demurrers to the answer, present the questions for our determination.

This note, not being payable to order or bearer, in a bank in this state, is not negotiable as inland bills of exchange, but whatever defense or set-off the maker had, before notice of assignment, against the assignor, the original payee, he has against his assignee. 2 G. & H. §§ 8, 6, p. 658.

The failure of *Kirkman* to comply with his agreement with *Rawlings*, to substitute the notes of the latter for those of *Kirkman* and *Rawlings* to *Small*, gave *Rawlings* a right of action against *Kirkman*. It is true that *Rawlings* could recover only nominal damages, until payment of the note to *Small*, but such payment only affected the measure of damages, the right of action being the violation of the agreement made at the date of the note.

It should be stated that this is a case not within the rule, that the terms of a written agreement can not be varied by parol evidence. The agreement of substitution in no way affected the terms of the note; it went to its consideration, and to explain the relation of the joint makers of the note to *Small*, which may be done by parol evidence, even if

Reno v. Tyson, Administrator of Oldham.

such proof change the legal effect of the writing. *Rockhill v. Spraggs et. al.*, 9 Ind. 80.

The assignment of this note was by delivery only, which vested in the holder an equitable interest therein, and gave him a right to sue in his own name, by making the payee a party defendant, to answer to his interest. In such case, the right of the maker to the defense set up is the same as in the case of an assignment by written indorsement. 2 G. & H., § 6, pp. 38, 39, 40.

In this class of cases, circumstances tending to show knowledge, in the absence of fraud, are not equivalent to notice of assignment. The burden of showing notice is on the plaintiff. *Jackson v. Adamson*, 7 Blackf. 597. If *Rawlings* had notice of the assignment to the plaintiff before payment to *Small*, it was for the plaintiff to show it.

The judgment is reversed, and the cause remanded to said court, with directions to overrule the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion. Costs against appellee.

Linsday and Lewis, for appellant.

R. Vaile, for appellee.

RENO v. TYSON, ADMINISTRATOR OF OLDHAM.

DEMURRER TO PART OF PARAGRAPH.—Under our present practice, a demurrer will not lie to a part of a paragraph of a pleading, but, regarding each separate breach assigned in a complaint on an administrator's bond, taken in connection with the introductory averments, as a separate paragraph, containing a distinct cause of action, a demurrer may be properly filed to each breach.

EXECUTOR'S BOND—LIABILITY OF SURETY.—The surety on the original bond of an executor is not liable for the misappropriation of money received from the sale of real estate, unless such sale was directed by the will.

APPEAL from the *Ripley* Common Pleas.

ELLIOTT, C. J.—This was a suit by the appellee, against *Majunsky Oldham*, and *Reno*, the appellant, as his surety, on the

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original bond of the former, as executor of *Archibald Oldham*, deceased, and who had been removed for malfeasance in office. Several breaches of the bond are assigned in the complaint; the *third* of which is, in substance, as follows: That *Oldham*, as executor of the estate of *Archibald Oldham*, deceased, collected on the sale bill of the personal property the sum of four hundred dollars; that at the *October* term, 1859, of the Court of Common Pleas of *Ripley* county, he procured an order to sell certain real estate to pay debts, which he afterward, under the order of said court, sold to *Henry Cordes*, for the sum of \$710, which said *Cordes* has long since fully paid; that the executor wholly failed to apply said money to the payment of the debts against the estate of the decedent, &c. The defendants filed a joint demurrer to the third breach of the bond, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants excepted. *Reno* then filed his separate demurrer to so much of the third breach as claims a recovery in this suit for the proceeds of the real estate sold under the order of the court, which the court also overruled. *Reno*, then, answered separately, in six paragraphs. The first and second are general denials; the others set up special matters in avoidance. The fourth and fifth were stricken out on motion, and the court sustained a demurrer to the third and sixth paragraphs.

The cause was tried by a jury, on the issue made by the general denial of *Reno*, and resulted in a finding and judgment for the plaintiff. *Reno* appealed. No brief has been filed by the appellee.

The only errors assigned relate to the action of the court in overruling *Reno's* demurrer to the *third* breach of the bond assigned in the complaint, and in sustaining a demurrer to the *third* paragraph of his answer. Under our present practice, a demurrer will not lie to a part of a paragraph of a pleading; but, regarding each separate breach assigned on a bond of the character of the one in suit, taken in connection with the other introductory averments in the complaint, in the

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light of a separate paragraph, containing a distinct cause of action, a demurrer may be properly filed to such breach. Under the third breach, as has been shown, the plaintiff seeks to recover the sum of \$400, the proceeds of the personal property, and the sum of \$710, the proceeds of the real estate, sold by the executor of *Oldham*, and for which he failed to account. The objection taken to the breach is, that the defendants, and especially *Reno*, the surety, are not liable under this (the original) bond of the executor, for the proceeds of the real estate sold by him under an order of the court, and for which he is required by the statute to execute a separate bond. The demurrer, however, was correctly overruled, because the same breach sets up a claim for the proceeds of the personal property, which is clearly covered by the bond in suit. And *Reno's* demurrer, to a part of the breach, was correctly overruled, for the reason that the question could not be raised by demurrer to such part. In either case, the objection might have been properly presented by a motion to strike out the matter objected to.

The question, however, is fairly raised by the *third* paragraph of *Reno's* answer to the *third* breach, to which the court sustained a demurrer. That paragraph alleges that *Reno*, on the 12th of *March*, 1858, became the surety of *Majunsey Oldham*, for the faithful performance of his duties as executor of the last will and testament of *Archibald Oldham*, deceased; that there came into the hands of said executor the sum of \$400, arising from the sale of the personal estate of the decedent, all of which the executor applied to the payment of lawful claims against said estate, filed in, and allowed by, the court, together with what he has paid the widow of said decedent, as a part of the \$300 allowed her by law; that the real estate of the decedent was not, by the terms of his will, authorized to be sold, &c.; that at the *October* term, 1859, of said court, the executor obtained an order of court to sell the real estate of the decedent, (which is described in the paragraph), by virtue of which order he did, on, &c., sell the same to *Henry Cordes*,

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for the sum of \$710; that at the time of obtaining the order to sell, &c., the executor filed his bond for the faithful performance of said trust, according to law, with *Absalom Oldham* and *Peter Bowers* as his sureties. It also avers that said *Absalom Oldham* and *Peter Bowers* are responsible and solvent men, &c.

This answer is a good bar to a recovery on the alleged breach of the bond to which it is directed, unless the parties to the original bond of the executors are responsible for the proper administration of the proceeds of the real estate, sold by him under a subsequent order of the court. Under the statute, the court of common pleas may authorize the executor or administrator of a decedent to sell his real estate for the payment of debts, when the personal estate is not sufficient for that purpose; and in reference to such sales, sec. 82, 2 G. & H., p. 510, provides that "previous to the making of an order for any such sale, the executor or administrator shall file in the office of such court a bond, payable to the State of Indiana, in a penalty not less than double the appraised value of the real estate to be sold, with sufficient freehold sureties, to be approved of by the court, and conditioned for the faithful discharge of his trusts according to law."

The statute further provides, that a person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute a bond with sufficient freehold sureties, to be approved by the proper clerk or court, payable to the state, in a penalty of not less than double the value of the personal estate to be administered, and, in case real estate is to be sold by the terms of a will, also double the value of such real estate. 2 G. & H., § 19, 489.

The trust of the administrator or executor, under his original appointment and bond, relates only to the personal estate, unless real estate is directed to be sold by the terms of the will, and, therefore, it seems plain that the bond then given can cover only breaches of that trust. Here the answer expressly avers that the real estate of the decedent was not,

Nelson v. McPike and Another.

by the terms of the will, authorized to be sold. Hence, the court, before granting an order for the sale of the land, required the administrator to execute a bond in double the value thereof, to secure the trust conferred upon him by the order of the court directing the sale of the land. And it has been expressly held by this court that, under the statute, the sureties in the several bonds are liable only for the respective funds they are executed to secure. *Worgang's Adm'r. v. Clipp et al.*, 21 Ind., 119. See also *Potter et al., v. The State ex rel. Thompson*, decided by this court at the last term. 28 Ind., 607.

We think, therefore, that the third paragraph of the answer was a good bar to the *third* breach, and that the court erred in sustaining the demurrer to it.

The judgment, as to *Reno*, is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

H. C. Newcomb, J. Tarkington and J. G. Burkshire, for appellant.

NELSON v. MCPIKE and Another.

DRAFT—SUBSTITUTE.—Suit upon a note and to foreclose a mortgage. Answer, that the defendant having been drafted to serve in the army for nine months, agreed with the plaintiff to pay him \$800 if he would go as his substitute, and serve the United States as a soldier for nine months, and executed to him the note sued on for a part of said sum; that the plaintiff, after remaining in camp a few weeks, deserted and fled to parts unknown.

Held, that a demurrer to the answer was correctly overruled.

Held, also, that though the defendant was released from the effect of the draft by the acceptance of the plaintiff as his substitute, he was also interested that the plaintiff should serve the country as a soldier, as he had agreed, and was entitled to defend on failure of this part of the consideration.

APPEAL from the *Boone* Common Pleas.

FRAZER, J.—This was an action by the appellant to foreclose a mortgage given to secure a promissory note for \$200. Answer, that the defendant, McPike, was drafted to serve nine months in the military service of the United States; that in consideration of the note, and \$100 in cash, the plaintiff agreed to enter the army as a substitute for the defendant, and serve the United States as a soldier for nine months; that the plaintiff was duly mustered in as such substitute, and after remaining in camp a few days, without the knowledge or consent of the defendant, deserted and fled to parts unknown, and has never returned to the service, and still remains a deserter, wherefore the consideration for the note has failed. A demurrer to the answer was overruled. Reply: 1st, general denial; 2d, a paragraph simply amounting to a denial, which need not be further noticed. The issue was found for the defendant; motion for a new trial overruled, and judgment for the defendant.

1. Was the answer good? This question is not seriously pressed in argument, and we therefore content ourselves by saying that the demurrer was properly overruled.

2. Does the evidence sustain the finding? It establishes the truth of every word of the answer, and especially that the plaintiff contracted with the defendant to serve the country faithfully for nine months as a soldier, and that, at the first opportunity, he deserted his flag, and fled, no one knows where. But it further appears, that before deserting he availed himself of an opportunity given to drafted men and substitutes to volunteer for one year.

It is argued, that the defendant having been released from his obligation to serve as a drafted man, cannot set up the subsequent desertion of the plaintiff, though in direct violation of the express contract which constituted the consideration of the note, because it was no injury to him. We cannot give assent to such a proposition. The defendant had two interests to subserve, and it was perfectly

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competent and proper for him to contract concerning both. One of these was to relieve himself from the personal performance of the military service that was incumbent upon him; the other was to furnish his country with a soldier who would faithfully serve her. It would be a positive reproach to our laws, if they did not regard the latter as of sufficient consequence to enforce a contract having reference to it. In the present case, actual service in the army was expressly contracted for, and that contract is wholly unperformed by the plaintiff. With \$100 of the money of the defendant already in his pocket, the deserter asks \$200 more. The court below properly refused to give it. We are not a little surprised that he should have hoped to recover in such a case.

The judgment is affirmed, with costs.

A. J. Boone, for appellant.

Hamilton and Galvin, for appellees.

THE INDIANA AND ILLINOIS CENTRAL RAILWAY COMPANY v.
McKERNAN.

PLEDGE OF STOCK—SALE BY PLEDGE—Suit to compel the transfer of stock on the books of the company. The complaint alleged that one A, who was the owner of 407 shares of the stock of the railroad company, delivered the same, without assignment, to B, as collateral security for the payment of ten thousand dollars; that afterward B, still holding said stock, and his debt being unpaid, transferred his interest in the stock to plaintiff, for value received; that plaintiff afterward gave notice, in a public newspaper, that at a given time, and place, he would sell said stock at public auction, and, in pursuance of said notice, did sell the same, and became himself the purchaser for \$810; that he afterward demanded of the railroad company the transfer of the stock on their books, which was refused. B was not joined as a defendant. A suffered a default on constructive notice, by publication. The company answered: 1st. That the board of directors had made a by-law that the stock of the company should only be transferred in person, or by attorney, on the books of the company, which was also expressed in the certificates, and that neither A

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nor his attorney had applied for such transfer. 2d. That neither A nor B had ever had notice to redeem, or personal notice of the alleged sale.

Held, that as A was only constructively summoned, the allegations of the complaint against him could not be taken as confessed, without proof, and the railroad company had a right to insist that the plaintiff should at least show a *prima facie* case of ownership.

Held, also, that as the proof showed the transfer of the stock by B to the plaintiff to have been by way of pledge, B was a necessary party to a complete determination of the controversy, and the company had a right to demand that he should be made a party.

Held, also, that when the stocks and bonds of a corporation are pledged, they may, upon default, be sold for the debt; but such sale must be at public auction, and can only be made upon demand of payment, and notice to the pledgor of the time and place of sale. But if the pledgor cannot be found, so as to have a personal demand made upon him, then the pledgee must resort to his bill, and have a judicial sale.

Held, also, that the plaintiff acquired no title to the stock by his sale.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—Suit by *McKernan* against the *Railway Company* and *Salmon A. Buell*, to compel the transfer of stock.

The complaint avers, that on, &c., the defendant, *Buell*, was indebted to one *James P. Drake* in the sum of ten thousand dollars, and being so indebted he delivered, without assignment, to *Drake*, as collateral security, certificates for four hundred and seven shares of the capital stock of the *Indiana and Illinois Central Railway Company*, of which *Buell* was then the holder and owner. That afterward, the debt still remaining unpaid, *Drake*, having possession of the certificates of stock, on, &c., transferred his interest in the stock to the plaintiff, for value received. That the principal debt being still due and unpaid, the plaintiff, on the 14th of *December*, 1863, by publication in the *Indiana State Sentinel*, gave public notice that he would sell the stock at public sale on the 7th of *January*, 1864, between the hours of ten o'clock A. M. and 4 o'clock P. M., at the office of *McKernan and Pierce*, No. 39 West Washington street, in the city of *Indianapolis*. A copy of the notice is made a part of the complaint. That afterward, on the 7th of *January*, 1864, at the time and place mentioned in said notice,

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the plaintiff caused the stock to be exposed for sale at public auction, by an auctioneer; and the plaintiff, to protect his interest, bid in the stock for \$610 50, that being the best bid that could be obtained therefor.

That the auctioneer made a written memorandum thereof. That afterward, on, &c., the plaintiff made a demand upon the railroad company for the transfer of the stock to him on the books of the company, which was refused, &c.

There was publication as to *Buell*, and he made default.

The railroad company demurred to the complaint on the ground, 1st, That the complaint does not state facts sufficient to constitute a cause of action. 2d, That there is a defect of parties, in this, that *Drake* is not made a party defendant.

The demurrer was overruled, and the company excepted.

The appellant answered: 1st. By the general denial. 2d. That the defendant is a railroad corporation, incorporated under the general law; that under the provisions of the act entitled, "An act to provide for the incorporation of railroad companies, approved May 11, 1852," the duly elected and qualified board of directors of the corporation made a by-law, in the words and figures following, to-wit: "The stock of the company shall be transferable, in person or by attorney, upon the books of the company." That the certificates of stock in question contained the following clause: "This stock is transferable only on the books of the company, in person or by attorney, and surrender of this certificate." That this by-law is, and has been for more than eight years, in full force. * * * *

That the demand for the transfer was made on the president and secretary of the company, who had no power to change the by-law, but were bound to obey it; that the transfer was not demanded by *Buell* in person, or by attorney, but by *McKernan*, as charged in the complaint, claiming under *Drake*, who is unknown to the defendant as the

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owner or holder of such stock; that *Buell* is yet, as shown by the books of the corporation, the owner of the stock.

3d. That *Drake* and *Buell* have never had notice to redeem the stock pledged, as pretended in the complaint, nor has either of them ever had personal notice of the pretended sale.

The plaintiff demurred to the second and third paragraphs of the answer. The court sustained the demurrers, and the appellant excepted.

Trial by the court; finding for the plaintiff; motion for a new trial overruled, and the appellant excepted. The evidence is in the record. The notice on which the stock was sold is as follows:

‘NOTICE—RAILWAY STOCK FOR SALE.’

“Notice is hereby given to all whom it may concern, that on the 28th day of *November*, 1855, *Salmon A. Buell*, being the owner of 407 shares of the capital stock of the *Indiana and Illinois Central Railway Company*, said stock being in \$50 shares, and holding as evidence of his title, certificates of said company, viz: No. 1730 for 227 shares, and No. 1731 for 180 shares, and being indebted to *James P. Drake* in the sum of \$10,000, did, on the day aforesaid, deliver said certificates and stock, without assignment, to said *Drake*, in pledge as security for the payment of said debt, and that on the 1st day of *December*, 1862, said *Drake*, by delivery, for divers good considerations, transferred his interest in said pledged certificates and stock to the undersigned. And the principal debt being now due, and wholly unpaid, I will, on *Thursday*, the 7th day of *January*, 1864, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day, at the office of *McKernan and Pierce*, No. 39 West Washington street, in the city of *Indianapolis*, offer said 407 shares of said stock for sale, at public auction, for the payment of the said debt of *Buell* to *Drake*.

“(Signed,)

J. H. McKERNAN.”

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No other notice, than the publication of this, was given to *Drake* or *Buell*. *McKernan* swears that the stock was handed to him by *Drake*, to secure \$3,000 advanced by him to *Drake*.

It is contended by the counsel for the appellee, that the railroad company cannot dispute *McKernan's* title to the stock, *Buell* having suffered a default, on constructive notice of the pendency of the suit.

The statute provides that "the statements of a complaint against a defendant constructively summoned, and who has not appeared, except such as are for his benefit, shall not be taken as true, but shall be established by proof," 2 G. & H., § 392, p. 224. And such defendant, except in cases of divorce, may, at any time within five years after the rendition of the judgment, have the same opened, and be allowed to defend. 2 G. & H., § 43, p. 66. We think, in such case, the railroad company has a right to insist on the plaintiff making out at least a *prima facie* right to the legal title of the stock in question.

The complaint avers an absolute transfer from *Drake* to *McKernan* of the interest of the former in the stock, but the proof shows, that *Drake* only pledged the stock to *McKernan* for the repayment of the \$3,000 advanced by the latter to the former. Under the facts in the case, *Drake* was a necessary party; he had an interest in the subject matter of the litigation, and was a necessary party for complete relief. The railroad company had a right to insist on his being made a party for the protection of its rights.

The statute provides that "when any action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action." 2 G. & H., § 6, pp. 38, 39, 40. This applies as well to *Drake*, the intermediate, as to *Buell*, the original assignor, under the facts of the case, *Drake* still having an "interest in the subject of the action."

McKernan could only acquire the legal title to the stock by a sale authorized by law.

In the case of *Evans v. Darlington*, 5 Blackf. 320, *Sullivan*, J., in delivering the opinion of this court, says: "When property has been pledged, as in the case before us, the pawnee has two remedies, either of which he may select. He may file a bill in chancery and have a judicial sale under a decree of foreclosure, or he may sell without judicial process, on the refusal of the debtor to redeem, after reasonable notice to do so. In this case, the pawnee pursued neither of the remedies given him by the law. The sale, therefore, was without authority and consequently void."

Where the stock or bonds of a corporation are pledged, they may, upon default, be sold for the debt. But such sale must be at public auction, and can only be made upon demand of payment, and notice to the pledgor of the time and place of sale. *Brown v. Ward*, 3 Duer 660. The rule in this respect is the same, whether the pledge was made to secure a debt payable presently, or one payable at a future day. *Stearns v. Marsh*, 4 Denio 227; *Wilson v. Little*, 2 Comstock 443.

If the pledgor cannot be found, so as to have a personal demand made of him, the pledgee *must* resort to his bill. *Stearns v. Marsh*, *supra*.

There are several other questions made by the counsel of the appellant, but as *McKernan* acquired no title to the stock by his sale, the other questions become immaterial.

The judgment is reversed, at the cost of the appellee, and the cause remanded to said court, with directions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

B. K. Elliott, for appellant.

L. Barbour and *J. D. Howland*, for appellee.

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94	68
194	50
185	475
24	68
135	149
135	96
24	68
133	344

McDONALD and Another v. McDONALD and Others.

PARTIES.—WITNESSES.—The exception to the law allowing parties to testify in their own behalf, which excludes such testimony "in all suits where an executor, or administrator, or guardian is a party," &c., (2 G. & H. 168, note,) does not apply to an action against the heirs of a decedent to recover real estate or declare a trust, though one of the defendants is an infant, and answers by guardian *ad litem*.

RESULTING TRUST.—When an estate is purchased in the name of one, with money belonging to and paid by another, a trust results in favor of the party to whom the money belonged, and this trust, thus implied by law, cannot be defeated by the fact that it was orally declared and acknowledged by the parties.

SAME.—The statute of trusts and powers, (1 G. & H. sec. 6, 8, p. 651,) expressly admits a trust where a conveyance of land is made to one, the consideration being paid by another, if by agreement, without any fraudulent intent, the party to whom the conveyance was made was to hold the land in trust.

APPEAL from the *Jefferson* Circuit Court.

FRAZER, J.—Partition. The plaintiffs and defendants were the heirs at law of *Patrick McDonald*, deceased. The defendants, who are appellants here, claimed each one-third of the land by answer, in the nature of a counter-claim, in which they admit that the legal title was in *Patrick* at the time of his death, but aver that they, *Edward* and *Michael*, were the equitable owners of the undivided two-third part thereof, because they and the said *Patrick McDonald* purchased said lands in partnership, paid for the same with their joint moneys, had occupied them in common, and improved them for their joint benefit, and had cultivated them continuously for their joint support, and as partners, from the date of purchase to the time of the death of *Patrick*, &c.; and that the deed for the several pieces of land described, were made to *Patrick* to be held, and which he did hold, by agreement, in trust for said partnership concern.

Reply: 1st, general denial; 2d, twenty years adverse possession. Verdict and judgment for plaintiffs.

A cross error assigned may as well first be considered. It is, that the defendants were permitted to testify as witnesses

in their own behalf. The solution of the question depends upon the act of 1861. 2 G. & H. 168, note. By that act, the parties to an action are made competent witnesses for themselves, except in certain cases; and among the exceptions are named "all suits where an executor, administrator or guardian is a party," and judgment may be rendered for or against the estate represented by the executor, administrator or guardian. The case at bar can not be brought within the exceptions of the statute by any kind of construction of which the language is susceptible. This is not a case to which an administrator, executor or guardian is a party. There was an infant defendant to the complaint, for whom the court appointed a guardian *ad litem*, but that did not make the guardian *ad litem* a party to the suit. The most that can be said is that there was exactly the same reason for making the exception broad enough to cover cases like this, that there was to make it as it is. That the argument would have controlling influence, if the language of the act left any room for construction; but as there is none, it can be efficient only when addressed to the legislature. We adhere to the decision made upon this point in *Dakoney v. Hall*, 20 Ind. 264.

The evidence strongly supported the allegations of the answer. It tended to show an agreement between the three brothers, made in Europe, and afterward renewed in this country, to labor on joint account, for the purpose of creating a common fund, to be invested in lands for the benefit of all, and that this agreement was faithfully executed, each by his earnings contributing to the fund, and that the lands so purchased were jointly occupied and used; but this contract was not in writing, and the title deeds were all taken in the name of the deceased, by agreement as alleged.

The question raised by instructions given to the jury, and others asked and refused, and which we must decide, is whether, under such circumstances, there would be a resulting trust in favor of the appellants.

McDonald and Another v. McDonald and Others.

That an estate purchased in the name of one, with money belonging to and paid by another, is subject to a resulting trust in favor of the party to whom the money belonged, is a familiar doctrine of equity. The trust is implied, and need not therefore be proven by written evidence, the case being expressly excepted from the operation of the statute of frauds. But in the case before us there is an additional element; it was, orally, expressly agreed that the lands should be purchased and held for joint use and benefit. Does this change the case so as to render parol evidence insufficient to establish the trust? This question has, we believe, never been expressly decided by this court in a case where the point was necessarily involved; but it has nevertheless attracted the attention of the judges, and received some consideration at their hands. In *Ircin v. Ivers*, 7 Ind. 308, Judge DAVISON, in delivering the opinion, seemed to favor the proposition that though the circumstances attending the purchase would of themselves raise a trust by implication, yet that if the same trust had also been verbally and specifically declared, then the trust must fail, because it would be within the statute. But in *Miller v. Blackburn*, 14 Ind. 62, Judge HANNA withheld his assent from this doctrine, and Judge WORDEN, in the same case, expressed himself not satisfied with it, as applicable to cases where the trust proved by parol is the same as that resulting by implication. The elementary writers declare the rule in the broad and general terms which received the assent of Judge DAVISON, above referred to; but we have not been able to discover any adjudicated case which justifies it; nor does it seem to us to rest upon any solid reason. When a particular trust is clearly shown by parol to have been intended, there is manifest justice in excluding thereby the implication of another, altogether different, in all cases not tainted with fraud; but it would be impossible to assign any satisfactory reason for a determination that a trust which equity, in aid of justice and fair dealing, implies from the circumstance that the *cestui que trust* paid

the purchase money, shall be defeated by the mere fact that the trustee was honest enough to declare orally the obligation which rested on his conscience, and too honest to deny or conceal it. Upon principle, it would be a paradox to say that the frank admission and promulgation of the existence of a fact shall prevent that very fact from having its rightful consequences, and, indeed, prevent it from being shown by other means; or that it shall bar the implication of its existence which would otherwise result; the express declaration of the truth orally, becoming a means to deprive the other party of the rights which are otherwise due to him, because the law implies the very truth thus asserted! We think that no court has ever deliberately sanctioned such a doctrine, and we are not disposed to set the example.

But it seems to us that our statute concerning trusts and powers conclusively settles a part of the case before us. It somewhat changes the general doctrine previously held, but makes a rule which is applicable to all the lands which were purchased after the act came in force. It provides generally that where a conveyance is made to one, the consideration being paid by another, no trust shall result in favor of the latter, if the conveyance was so taken with his consent, except in certain cases; and one of the cases so excepted is where by agreement, without any fraudulent intent, the party to whom the conveyance was made was to hold the land in trust. 1 G. & H. §§ 6, 8, p. 651. It appears by the evidence that several of the tracts of land were conveyed to *Patrick* after this statute took effect, and there is nothing to taint the transaction with a fraudulent intent.

We have not considered a question much discussed in the briefs, whether there was such a partnership between the three brothers as would subject the estate in these lands to commercial conditions, like personal property, and whether such partnership contract is within the statute, for the reason that it has seemed to us unnecessary for the purposes of the present case. It is enough that the lands

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were purchased with a common fund, owned in part by the appellants, and that in consequence a trust in their favor results.

It is argued, however, that the evidence did not disclose exactly what aliquot part of the purchase money of the lands belonged to the appellants respectively, and consequently that there could have been no verdict for them at any rate. We cannot say that. There was evidence upon the subject which would have justified the jury in finding some part of the money to have been paid by them, and possibly that each paid one-third. We are not called upon to say what the jury ought to have found upon that subject. That there was evidence upon it which would have supported a finding for the appellants in this court, and that it was excluded from their consideration by the charge of the court that "the defendants have failed to sustain their answer," constitutes error which must reverse the case.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Harrington & Korbly and J. Sullivan, for appellants.

C. E. Walker and A. D. Mathews, for appellees.

MICHAEL v. THOMAS.

JUSTICE OF THE PEACE—JURISDICTION.—A suit before a justice of the peace against a sole defendant, who is a resident of this state, must be begun in the township where the defendant resides, if there is a justice in the township competent to try the cause, unless the proceedings are begun by *capias*. That the suit is by attachment, and that property has been attached in the township, does not give the justice jurisdiction.

APPEAL from the *Fountain* Common Pleas.

ELLIOTT, C. J.—*Thomas*, the appellee, on the 4th day of June, 1864, filed a complaint before *William Worthington*, a justice

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of the peace of *Logan* township, in *Fountain* county, against *Michael*, the appellant, to recover the sum of \$37 90, due him on a judgment of a justice of the peace of *Warren* county, *Indiana*, against *Michael*. *Thomas*, at the same time, filed his affidavit and undertaking under the statute, and sued out an attachment against *Michael's* property. A summons was issued on the complaint, and personally served on the defendant. The attachment was also duly levied on personal property.

The cause stated in the affidavit for the attachment, is "that the said *Michael* is removing his property subject to execution out of this state, not leaving enough therein to satisfy the plaintiff's claim."

On the day set for the trial, *Michael* appeared and filed a plea in abatement, under oath, to the jurisdiction of the justice over his person. The plea, after properly entitling the cause, proceeds thus: "Now comes the defendant in the above entitled cause, and pleads in abatement of the writ and complaint herein, and says that he is not a resident of *Logan* township, *Fountain* county, but is now, and was at the time of the filing of the complaint herein, a *bona fide* resident of *Warren* township, in the county of *Warren*, and State of *Indiana*; that there are three justices of the peace in said township competent to try said cause, of kin to neither of the parties herein; that the said suit was not commenced by *capias*, wherefore, defendant says that the court has no jurisdiction of the person of said defendant," &c. The justice of the peace "overruled the plea," and the defendant then filed his answer in denial and set-off. There was a trial before the justice, and judgment for the plaintiff; from which *Michael* appealed to the *Fountain* Common Pleas Court.

In the common pleas, the trial of the cause, by agreement of the parties, was submitted to the court, when, as the bill of exceptions filed in the cause informs us, "the defendant presented and read to the court his plea in abatement, filed before the justice of the peace," and which is again copied

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into the bill of exceptions; "whereupon the plaintiff admitted the facts set forth in said plea, and claimed that, whether true or not, was immaterial in this form of action, property being attached." The plaintiff then gave in evidence a certified transcript of the judgment upon which the suit is founded, which was all the evidence given in the cause. The court thereupon overruled the plea in abatement, and found for the plaintiff. A motion for a new trial was made by the defendant, and overruled, and proper exceptions taken.

Michael appeals to this court.

The material questions presented here arise upon the rulings of the court below in reference to the plea in abatement to the jurisdiction of the justice of the peace, before whom the suit was originally instituted. No question arises in the case as to the want of diligence of the defendant below in presenting the question. The first step taken by him before the justice, and before any answer to the merits of the action was filed, was to file the plea in abatement to the justice's jurisdiction, but the justice overruled it. It formed a part of the pleadings in the cause, and as such was sent up to the court of common pleas. It was the first question presented on the trial of the cause in the latter court, and the facts stated in it were admitted by the plaintiff below to be true. But the court overruled the plea, and continued to entertain the jurisdiction of the cause. The question then arises had the justice of the peace before whom the suit was brought, under the facts stated in the plea of abatement, jurisdiction of the person of the defendant? The solution of the question must depend upon the statute.

The justices' act provides that "the jurisdiction of justices in civil cases shall, unless otherwise provided by law, be limited to their townships respectively." 2 G. & H., § 9, p. 578. The 18th section of the same act, as printed in 2 G. & H., p. 580, is an amendment of the original section, enacted by the legislature in 1861, and will be found in the acts of that session at page 141. The act is entitled "an act to amend the thirteenth and fourteenth sections of an act entitled 'an

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act for the election of justices of the peace, and defining their jurisdiction," &c.; and the said 13th section, as amended, provides that "no person who is a resident of any township in this state shall be sued out of said township, except as specified in the above mentioned acts," (it should be *act*, as a single act only is referred to or mentioned in the title,) "unless said suit is commenced by *capias ad respondendum*, or when there shall be no justice competent to act in such township."

The plea before us states that at the time of the commencement of the suit, and of filing the plea, the defendant was not a resident of the township, in *Fountain* county, in which the suit was brought, but that he then was, and now is, a *bona fide* resident of *Warren* township, in *Warren* county, in this state. The section of the statute just referred to contains but two exceptions; they are: 1. When the suit is commenced by *capias*, and, 2. When there shall be no justice competent to act, in such township. Both of these exceptions are expressly negatived by the plea. There are other exceptions in the act referred to, but they are obviously inapplicable to this case. See *Ludwick v. Beckamire*, 15 Ind. 198; *Jocelyn v. Barrett*, 18 Ind. 128; *Harris v. Knapp et al.*, 21 Ind. 198.

It thus appears that under the facts stated in the answer, *Michael* was not liable to be sued before the justice in *Fountain* county, for the want of jurisdiction in the justice over his person. But, it is argued, as proceedings in attachment were sued out at the same time, on the same cause of action, and the defendant's property seized under the attachment, the justice thereby acquired jurisdiction. But, from a careful examination of the provisions of the statute, we are unable to find anything to sustain the position assumed.

Section 122 of the justices' act enacts that "justices may issue writs of attachment against the personal property of a debtor, under the rules prescribed for the prosecution of such writs, when the amount claimed by any one creditor does not exceed one hundred dollars, and their jurisdiction in such case shall be co-extensive with the county." Section 196 of

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the code is to the same effect. It provides that attachments against the goods, &c., "of defendants, may be issued in cases contemplated by the foregoing provisions, upon any claims within the jurisdiction of a justice of the peace, upon," &c., "and the justice shall perform the duties required of the court and clerk thereof, and the constable shall perform the duties required of the sheriff, in the above provisions. The constable shall return the order of attachment within ten days, with his doings thereon; and in case where a summons has not been served, and property has been attached, the justice shall give three weeks notice of the attachment in some public newspaper," &c., "and fix the day of trial at the expiration of such notice."

The *first* of these sections authorizes justices to issue writs of attachment in cases within their jurisdiction, and, for the purposes of the attachment, makes their jurisdiction, territorially, co-extensive with their respective counties. The other section also authorizes justices to issue attachments, and prescribes the mode of procedure; but neither of them relates to the question of jurisdiction over the person of the debtor. They do not either enlarge or limit the jurisdiction in that respect.

The statute provides that "The plaintiff, *at the commencement of an action, or at any time afterward*, may have an attachment against the property of the defendant," in certain specified cases; and this court has held that, under this statute, "a proceeding in attachment is not an original suit, but is auxiliary, only, to such suits." *Fechheimer et al. v. Hays*, 11 Ind. 478. An attachment may be issued *at the commencement* of an action; but to authorize an attachment, a suit must be commenced; that is, a complaint must be filed against the defendant; and a summons issued thereon, and the question arises, where must the suit be commenced? The statute answers the question. If the suit is in the circuit or common pleas court, against a sole defendant, and founded on contract, as in this case, then the action must be commenced in the county in which the defendant "has his

Farbach v. The State.

usual place of residence," if he has such residence in any county in this state. See 2 G. & H., § 33, p. 58. And if, as here, the defendant resides in any township in this state, and the suit be brought before a justice, unless commenced by *capias*, it must be brought in the township of his residence, if there be a justice competent to act in such township. 2 G. & H., § 13, p. 580.

We think the plea in abatement was sufficient, and the facts alleged in it having been admitted by the plaintiff on the trial in the court below, the court should have dismissed the suit for want of jurisdiction.

Other questions, arising upon the admission of a justice's transcript in evidence on the trial, are discussed by the appellant's counsel, but as they are rendered immaterial by the conclusion arrived at on the question of jurisdiction, they will not be further noticed here.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to dismiss the cause at the cost of the plaintiff below, for want of jurisdiction.

J. McCabe, for appellant.

Milford & Milford, for appellee.

FARBACH v. THE STATE.

TWO CASES.

SALE OF LIQUOR TO MINOR.—If the defendant claims that the sale of liquor to a minor was made in the *bona fide* belief that he was an adult, the burden of proof is upon him to show facts which will justify the inference of such a belief.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—The constitutional questions fully considered and decided in *Hingle v. The State*, at this term, are also made in these cases, and we decide them as in that case.

24	77
129	300

24	77
171	8

Meikel and Others v. The German Saving Fund Society.

But there is here another question. There were indictments against a licensed vender of liquor for selling to a minor. The proof of the minority of the purchaser was clear, but it also appeared that he had a heavy, thick set, dark beard, and had voted. It is claimed that the evidence showed that the sale was made in the honest belief that the purchaser was of full age, and that therefore the verdict should have been for the defendant. We are not of opinion that we can disturb the verdict. It has been held that a sale of liquor to a minor, under the belief, entertained in good faith, that he was an adult, is not within the statute. *The State v. Kalb*, 14 Ind. 403. But the burden of proof on this subject is on the defendant, and to make out this defense he must show facts which will justify the inference of such *bona fide* belief. Then the question is for the jury, and we could interfere only in a very clear case. In the present instance, it appears that both resided in *Indianapolis*; that the purchaser was not a stranger to the defendant—at least, that he had, on other occasions, purchased liquor at the defendant's saloon, and for aught that appears, the defendant knew his age. In such cases the party must be held to pretty satisfactory proof of good faith, and this involves the exercise of his opportunities for ascertaining the truth, as well as the necessity of some kind of evidence that he did not probably know the age of the minor.

The judgment is affirmed, with costs.

J. W. Gordon, for appellant.

MEIKEL and Others v. THE GERMAN SAVING FUND SOCIETY
OF INDIANAPOLIS.

On the 3d of March, 1860, A filed a transcript of a record in the Supreme Court, and procured a *supersedeas*; about a year afterward the court affirmed the judgment, with damages. Some two years later, the judgment remaining uncollected, a transcript of the same record was again

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filed, and another *supersedeas* obtained. Plea to the assignment of errors, the former judgment of this court.

Held, that the proper judgment is a dismissal of the appeal, at the appellants' costs, but that damages, as on the affirmance of a cause, cannot be awarded.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—Plea to the assignment of errors, the former judgment of this court in the same case; rule for reply, default for want of reply.

The proper judgment in this case is a judgment dismissing the appeal, at the cost of the appellants.

We are asked to award damages, as on affirmance. The statute provides that "if the court affirm the judgment, after an order of stay of execution has been granted, damages may be assessed in favor of the appellee, not exceeding ten per cent. upon the judgment."

The facts, as disclosed by the record, are that the appellants, on the 8d of *March*, 1860, filed a transcript of the record, and procured an order for the stay of execution. On the 31st of *May*, 1861—more than a year thereafter—the judgment was affirmed, with five per cent. damages. 16 Ind., 181. On the 17th of *April*, 1863, nearly two years thereafter, the appellants filed another transcript of the *same record* and procured an order for a *supersedeas*, and the case has remained in this court until now. To a plea setting up the former judgment, the appellants make no reply; but allow a judgment of dismissal by default. It is a hard case on the appellee; but if there is a remedy, it must be sought in some other manner.

It is difficult for us to see how such a proceeding could occur in this court without a liability accruing against some one. The statute provides that "an attorney who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge, or a party to an action or judicial proceeding, is punishable for a misdemeanor, and shall also forfeit to the party injured treble damages, recoverable in a civil action."

Rineman v. The State.

It is proper for us to say that the judge who granted the *supersedeas* had no knowledge of the facts, at the time the order was made.

The appeal is dismissed, at the cost of the appellants.

R. L. Walpole, for appellants.

J. Coburn, for appellee.

RINEMAN v. THE STATE.

The statute prohibiting sales of liquor to minors was not intended to make the vender liable criminally, in cases where, upon the exercise of every reasonable caution, he should yet be imposed upon as to the age of the buyer, and should sell to him in perfect good faith.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—In addition to the questions in *Balke v. The State*, and other like cases, at this term, which are decided by us in those cases, this involves another question, upon which it must be reversed.

It was an indictment for selling liquor to a minor. The court charged the jury that it was a question of fact, and not of intention, and that if the defendant was deceived and imposed upon as to the age of the buyer, that circumstance would go in mitigation of the punishment, but could not justify an acquittal. The law has been held otherwise by this court, in several cases, and we think correctly. The question is, at least, not so clear as to justify us now in disturbing that line of decisions. It is true that the statute does not, in terms, create the exception, but it is, we think, the better opinion that it was not intended by the act to make the vender liable criminally, in cases where, upon the exercise of every reasonable caution, he should yet be imposed upon as to the age of the buyer, and should sell to him in perfect good faith. But this rule must not be so loosely applied as to open the way to evasions of the law.

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It is more important that the young should be protected from temptation, than that those who have just reached their majority should be able to purchase with facility; and therefore the vender should be held to the exercise of great care and caution.

The judgment is reversed, and the cause remanded for a new trial.

J. W. Gordon, for appellant.

MOORE and Others v. WORLEY and Another.

ADVERSE POSSESSION.—To constitute an adverse possession of lands, so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act in good faith, and in the belief that he has title thereto, and his possession must be under color and claim of title, exclusive of any other right.

TRANSFER OF INTEREST PENDENTE LITE—PRACTICE.—Pending a suit for the recovery of real estate, in which the plaintiff claimed to be the owner of an undivided interest only, he purchased and took a conveyance of the remaining interests, and filed an amended complaint, alleging the entire title to be in him. On the trial, objection was made to the introduction in evidence of the deed executed to the plaintiff pending the suit, but no particular objection was pointed out.

Held, that under such circumstances no advantage can be taken in the Supreme Court of the action of the court below in admitting the deed in evidence.

APPEAL from the *Madison* Circuit Court.

GREGORY, J.—Suit by *Elijah Worley* and *Rachel Worley*, against *Nancy Wise*, to declare and execute a trust in real estate.

This action was commenced on the 20th of *August*, 1862. On the 7th of *October*, 1863, the death of *Nancy Wise* was suggested, and the appellees were made defendants, who claim the land as her legatees.

The amended complaint, on which the trial was had, was
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filed the 5th of *April*, 1864, and copies of the deeds under which the plaintiffs claim title are made exhibits.

The defendants answered, setting up title in fee in themselves, and denying that the plaintiffs have any valid title to the premises, either legal or equitable.

Trial by the court, finding that the equity of the case is with the plaintiffs; that *Solomon Wise*, deceased, held the land in controversy, as trustee for *Mary Ann Fifer*, now deceased, with full knowledge of his trust, and that the present defendants still hold the property in trust, to be by them executed; that the plaintiffs now hold all the interest of *Mary Ann Fifer* in and to the premises.

Motion for a new trial overruled, and the defendants excepted. The evidence is in the record, and tends to show the following facts: In *September*, 1834, *William Montgomery* gave his son-in-law, *William Fifer*, and his son, *James Montgomery*, each one hundred dollars, with which to enter eighty acres of land. They selected a quarter section of land, which they agreed to enter and divide east and west, instead of north and south, (the congressional survey). They employed an agent to make the entry, who entered the land in the name of *James Montgomery*. *Fifer* took possession of the land in controversy, (being the south half of the quarter section so entered by the agent,) and made lasting improvements thereon. In 1835 *Fifer* died, leaving an only child, *Mary Ann*, and his widow, *Elizabeth*, (the daughter of *William Montgomery*.) The widow, some five or six years after the death of her husband, married *Solomon Wise*, and at her request, *James Montgomery*, on the 24th of *August*, 1843, conveyed the land by deed in fee to *Wise*, without any consideration whatever moving from him. *Wise* took possession of the land, but repeatedly recognized the right of *Mary Ann* therein, and in 1849 signed and acknowledged a deed of conveyance in fee therefor to her, saying that in case of his death, his papers would secure to her the title. This deed, however, was never delivered. *Elizabeth*, the wife of *Wise*, and widow of *Fifer*, died,

leaving her only child, *Mary Ann*, and her last husband surviving. *Wise* married *Nancy Moore*, who survived him, and who was made defendant at the commencement of the case in judgment. There is no evidence as to the character of the possession of the land after the death of *Solomon Wise*.

It is contended that the money with which the purchase was made, was given by *William Montgomery* to his daughter, and not to his son-in-law. Under the well recognized rule governing this court, we cannot disturb the finding of the court below on this question, as the evidence strongly tends to prove that the money was given and delivered to the son-in-law.

It is urged by the counsel for the appellants that the deeds to the plaintiff, *Elijah*, for certain undivided portions of the land are void, on the ground that at the time of their execution the land was held *adversely*.

We do not think that the possession of *Solomon Wise* was adverse to *Mary Ann Fifer's* title. He took a voluntary conveyance from one he knew to be but a trustee; he repeatedly recognized the right of the *cestui que trust*, and actually signed and acknowledged a deed of conveyance in pursuance of the trust so cast upon him. Under such circumstances the court below could well find that as to him there was no adverse possession. As to *Nancy Wise* (the defendant,) she could only claim under *Solomon*, and there was no attempt at the trial to show how she claimed at the time of these conveyances. To make an adverse possession, there must not only be a color, but a claim of title.

To constitute a *possession adverse*, so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act *bona fide*. He must rely on his title; he must believe the land to be his, and that he has title thereto, although his title may not be rightful or valid. *Livingston v. The Peru Iron Company*, 9 Wendell's Rep., 511. And such possession must be under color and claim of title,

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and exclusive of any other right. *Smith v. Burtis*, 9 Johnson's R., 174.

The naked title of the trustee is not adverse to the title of the *cestui que trust*.

The remaining question in this case is, did the court err in admitting in evidence the deed from *William Roach* and wife to the plaintiff, *Elijah Worley*, dated 30th of August, 1862?

It is claimed that this deed was executed ten days after the commencement of the suit, and, therefore, ought not to have been received in evidence. This position cannot be sustained.

Rachel Worley, the wife of her co-plaintiff, was one of the heirs at law of *Mary Ann Fifer*. *Elijah Worley* held by deed, dated the 21st of April, 1862, the interests of four of the other heirs at law. The statute provides that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court, on motion, or supplemental complaint, at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by, or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." 2 G. & H., § 21, pp. 51, 52.

The amended complaint, on which the trial was had, was filed, as has been shown, on the 5th of April, 1864, and avers the entire title, then, in the plaintiffs, and a copy of the deed in question is made an exhibit. No motion was made to strike it out, and when offered, no particular objection was pointed out to the court below. Under such circumstances, no advantage can be taken in this court of the action of the court below in admitting the deed in evidence.

RINEMAN v. The State—Balke v. The State.

The judgment of the Circuit Court is affirmed, with costs against the appellants.

E. S. Stone and D. Moss, for appellants. ✓

J. Davis, for appellees.

RINEMAN v. THE STATE.

FOUR CASES.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—These cases differ only from *Farbach v. The State*, *ante*, p. 77, in the fact that it is in evidence that the defendant was unacquainted with the purchaser, and that a witness for the defense contradicts the witness for the state, as to the buyer, on being asked his age, answering that he was twenty-one; and, also, that the latter witness thought it a very foolish question to ask of a man with such a beard. We cannot disturb the finding below upon the evidence. We could do so, consistently with settled law, only in a very clear case, and without the opportunity possessed by the court below to judge of the credibility of the witnesses, we would not, in this case, be justified in interfering.

The judgment is affirmed, with costs.

J. W. Gordon, for appellant.

BALKE v. THE STATE.

THREE CASES.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—These cases involve questions which are determined in *Farbach v. The State*, at this term, and we determine them in the same way.

The judgment is affirmed, with costs.

J. W. Gordon, for appellant.

24	86
138	663
24	86
134	579
136	540
24	86
141	327

BLASINGAME AND OTHERS v. BLASINGAME.

PRACTICE.—Where the complaint consists of two paragraphs, the Supreme Court will not notice an alleged error in overruling a demurrer to one, if the finding and judgment of the court proceeded wholly upon the other. Page 87.

PLEADING—WRITTEN INSTRUMENT.—The statute requiring a copy of the written instrument upon which a pleading is based to be filed with it, (2 G. & H., sec 78, p. 104,) cannot apply to the case of lost instruments, where no copy can be obtained. Page 87.

SEMBLE.—That the averment of the loss of a written instrument sued upon, need not be supported by affidavit. Page 89.

PLEADING—DEMAND OF CONVEYANCE.—A, who owned a farm in Kentucky, agreed in writing with his son, B, to convey all of his real estate to the son, in consideration of his agreement to support and maintain A and his wife during their natural lives. During the life of the father, the son, with the father's consent, traded and assigned the lands in Kentucky for lands in Indiana, and, by the agreement and direction of the son, the conveyance was taken in the name of the father, for the purpose of securing the performance of the agreement between them. Suit by the son, alleging these facts; that he had fully performed the agreement on his part, and that the father had died, and by his will devised a portion of the lands to others, who were made defendants.

Held, that the complaint must be understood to mean that the land in Kentucky, to which the contract between the parties related, had been conveyed to the son, and that the land in Indiana, procured in exchange for the Kentucky lands, was paid for by the son, and the deed made to the father only as a security for the performance of his agreement, and in this view of the case, the action was not founded upon the written agreement, and it was not necessary to file a copy of it with the complaint.

Held, also, that neither the deceased nor the defendants were in default in not making the conveyance to the son, no demand having been made upon them, and it not appearing that the defendants were ever apprised of his rights. Page 90.

PRACTICE—AMENDMENTS.—It is error, after the evidence and argument are closed, to allow a party to amend his pleading so as to change the whole character of the case. Page 91.

PRACTICE—OBJECTIONS TO EVIDENCE.—Alleged errors growing out of the admission of evidence will not be considered by the Supreme Court, unless the ground of the objection was pointed out to the lower court. Page 91.

APPEAL from the *Tipton* Circuit Court.

FRAZER, J.—The complaint consists of two paragraphs. The overruling of a demurrer to the first is assigned for

error. We do not examine the question thus attempted to be presented, for the reason that the finding and judgment were upon the second paragraph alone, and consequently the appellants were not injured by the error, if any was committed. Errors of that class we do not regard as being in the record, in any sense which requires us to pass upon them.

The second paragraph of the complaint is treated in argument as seeking to obtain a specific performance of a written contract for the conveyance of real estate. A demurrer to it was overruled, and this is assigned for error. No copy of the written contract was filed with the complaint, but it was alleged in the paragraph that it had been stolen, lost or mislaid, and that, therefore, the plaintiff (who is appellee here) could not give a copy; but there was no affidavit of the truth of this averment; and this it is insisted was necessary.

The statute (section 78 of the code) enacts that "when any pleading is founded on a written instrument or an account, the original, or a copy thereof, must be filed with the pleading." This language is imperative, it is true, but surely it never was intended to prevent the maintenance of suits in cases where the instrument is lost, and it is thereby rendered impossible to make a copy of it. Accordingly, it was held in *Cleveland v. Roberts*, 14 Ind. 511, that an averment of loss, supported by affidavit, was sufficient to excuse the want of the copy. But whether such affidavit is *necessary* or not, under the code, has never been decided by this court. The question may not possess much practical consequence, and it may not be very important in the administration of justice, under our laws, which way it shall be decided; but it is not free from difficulty. Our system of pleading has destroyed the distinction between law and equity proceedings; or, rather, it has established one uniform system of pleading and practice, by which both classes of rights are to be sought, and remedies to be given for their infraction. The present is a case not expressly provided for by the code; but the laws and usages of this state in civil cases, prior thereto, are continued in force to supply omissions. § 802. But this

Blasingame and Others v. Blasingame.

does not in any degree relieve us, for upon this subject one rule prevailed at law, and an opposite one existed in equity. When the suit was brought at law to recover upon a lost instrument, no affidavit of the loss was required as a rule of pleading; while in equity the bill was obnoxious to a demurrer, if not supported by the complainant's affidavit of the loss—and, indeed, the objection was good, even upon the hearing. The reason given for the rule in equity was, that the court should require the oath of the party as a guaranty of his good faith, before proceeding to grant him relief upon the lost instrument. To decide this question, then, under existing circumstances, really imposes upon us the necessity of adopting such a rule as shall seem most in consonance with the spirit of our system—such as shall promise to be best suited to all cases of lost instruments, (for it should have uniform operation,)—and at the same time be most convenient in practice. It seems to us, upon consideration, that the statute requiring a copy of the instrument, as a part of the complaint, was intended, by a direct method, in all cases, to attain the end which, in suits at law upon sealed instruments, was formerly reached by *profert and oyer*; and to require an *actual* showing of the copy in court, instead of that nominal production of it, which *profert* was said to accomplish. In such suits, *profert* need not be made when the instrument was lost; but the facts to excuse the *profert* must have been averred, and were traversable, and, if not proved, the suit failed. No affidavit was required to make the pleading good. We do not perceive any good reason why this rule will not operate well under our practice. The affidavit would somewhat encumber the record, and be a repetition of an averment, and in a measure would, if required, defeat that neatness and brevity in pleading which it was an object of our code to attain. It would, under our practice, be unnecessary, also; for if the adverse party doubt the fact of the loss, he can call upon the party who has pleaded the instrument to testify and purge his conscience as to the matter. We are aware that, under the former practice, this

would have been a suit in equity, and that an affidavit would have been required. But our code contemplates a uniform system in all cases where it can be made applicable; and there is certainly no good reason for requiring the affidavit in cases in equity, and not requiring it in cases at law; and it seems to us, without, however, now intending to decide anything but the case before us, that the rule which prevailed at law is most in harmony with the principles and purposes of our system, and will be found most convenient in practice. We decide, therefore, that upon this point the complaint was not obnoxious to a demurrer.

The contract sued upon was between father and son. The complaint avers that the father owned a farm in Kentucky, and that by the agreement he bound himself to convey all his real estate, &c., to the son, in consideration of the maintenance of himself and wife during their natural lives by the son; that during the life of the father, the son, with the father's consent, traded and assigned the farm in Kentucky for the lands in *Tipton* county, described; and that, by the son's direction and agreement, the conveyance of the last mentioned lands was made to the father, for the purpose of securing the performance of the son's agreement to maintain him; that the son fully performed his agreement; that the father is dead; that by his last will he devised a portion of the lands to others, who are made defendants. It is argued that these facts do not entitle the plaintiff to any relief. It will be perceived that the contract to convey, as pleaded, specifies no time for the making of the conveyance by the father, and it is a fair inference, and perhaps the true construction of it, that it contemplated the farm in *Kentucky*; for it does not appear that the father was seized of any other lands. It is not shown by the paragraph, by express averment, whether the father did convey that farm to the plaintiff or not; but the averment that the plaintiff himself traded and assigned it for the other lands, now in controversy, the title to which was taken in the name of the father as a security, ought, we think, to be held to imply that the convey-

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ance of the *Kentucky* farm to the plaintiff had been made. The allegation that he "traded and assigned" it, implies the exercise of dominion over it, and a transfer of the title by him, which could not have been done by him, if the title remained in his father. That the latter consented, is in no respect inconsistent with this construction, for that implies no more than passive acquiescence, while it would not be possible to have effected the exchange without the performance of an efficient affirmative act by the father, if the title had still remained in him. This is construing the pleading most strongly against the pleader, a principle just as applicable under the code, as it was under the former system of pleading, and essentially necessary to be regarded, whenever a pleading is so loosely framed as to leave its import in reasonable doubt. It will require that care and exercise of knowledge in the preparation of pleadings which is absolutely essential to the correct administration of justice. The case made by the second paragraph of the complaint is then, in brief, that the plaintiff paid for the land in controversy, but took the title in the name of his father, to be held by him simply as security for the plaintiff's performance of his contract. In this view, the action was not founded upon the written contract, and no copy was required to be filed with the complaint under any circumstance. The object of the suit was to compel a conveyance to the plaintiff, the contract on his part having been fully performed. But neither the defendants, nor the deceased, are shown to be in default; the deceased could not be called upon to convey during his lifetime, nor is it averred that either he, or the defendants, were ever requested to do so; nor, even, that the defendants had any knowledge of the facts. They could be in no default until they had notice of the plaintiff's rights.

We have thus considered the sufficiency of the second paragraph of the complaint, as it now stands upon the record, for the reason that that question is argued in the briefs. But it was amended, by leave, after the evidence and arguments were closed, in a very important respect, and so as to change

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the whole character of the case. This is assigned for error, and it was error. Originally, the paragraph averred that the father, of his own accord, "traded and assigned his farm" in *Kentucky* for the lands in this state, and directed the conveyance of the latter to be made to the plaintiff; but that, by mistake, the deed was made in the name of the father. This amendment, it is stated, was made to "make the proofs correspond with the allegations." But it went too far; it substantially changed the claim. 2 G. & H., § 99, p. 118. It is highly probable that, in making the amendment by erasure and interlineation, and in haste, the pleader made a greater change than he intended. We must, however, take it as we find it, and treat it accordingly.

We have not considered a question argued, and which may be vital, when the pleadings shall be so amended as to enable the case actually existing to be tried, for the reason that it was not in the record, either before or after the amendment of the second paragraph of the complaint. That question is, whether the plaintiff, upon the contract upon which he sues, and which contemplated the conveyance to him of the land in *Kentucky*, can, after consenting to its sale, call for the conveyance of the lands in *Indiana*, which were purchased with the farm in *Kentucky*.

It is urged that the court erred in sundry rulings admitting evidence over the appellants' objections; but as no cause of objection appears in any case to have been brought to the attention of the court below, we do not examine the questions here. This rule is settled by numerous decisions of this court. *Corey v. Rhinehart*, 7 Ind. 290; *Lane v. The State*, 16 Ind. 14. We think it a fair rule, calculated to promote the correct administration of justice, and we are, therefore, not inclined to disturb it.

The judgment against the appellants is reversed, with costs, and the cause remanded, with directions to set aside all proceedings subsequent to the demurrer to the complaint, and proceed according to this opinion.

J. Green, for appellants.

J. A. Lewis and *D. Moss*, for appellee.

Bell's Administrator and Another v. Ayres and Wife.

BELL'S Administrator and Another v. AYRES and Wife.

Suit by a legatee against the administrator, and a creditor of the estate, alleging that the administrator had fraudulently allowed and paid the creditor's claim, knowing it to be unjust, and that by such payment the assets of the estate would be so reduced as to be insufficient to pay plaintiff's legacy. Prayer, that the allowance of the claim, and the report thereof by the administrator, be set aside, and the plaintiff allowed to contest the claim.

Held, that the plaintiff showed a sufficient interest to enable him to sue.

Held, also, that as the relief sought could not have been obtained by an appeal from the order of the court allowing the claim, the remedy sought was an appropriate one.

APPEAL from the *Hendricks Common Pleas*.

ELLIOTT, C. J.—Complaint by the appellees against *Darnall*, administrator of the estate of *Mary Bell*, deceased, and *William Arnold*, to set aside the allowance by the administrator of a claim filed against the estate by *Arnold*, as fraudulent; and also the report thereof to the court by the administrator. Issues of fact were formed and submitted to a jury, who found for the plaintiff. Motion by the defendant in arrest of judgment overruled, and judgment on the finding of the jury. The defendants appealed.

The only question arising upon the record, on the motion in arrest, is, do the facts stated in the complaint constitute a valid cause of action? We think they do. The complaint alleges that *Mary Bell*, by her last will and testament, bequeathed to the said *Mary Ayres* the sum of \$250, to be paid to her after the payment of the just debts against the estate; that on the 24th of *September*, 1863, the administrator admitted a claim, filed against the estate by the said *Arnold*, of \$314 58, and credited the amount thereof on a note due to the estate by said *Arnold*; that the administrator afterward reported the receipt of *Arnold* for the amount of said claim to the court, and was, by the court, allowed therefor; that the claim of *Arnold* was unjust and fraudulent, of which the administrator had notice, but that

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combining and confederating with said *Arnold* to cheat and defraud the estate, and said plaintiffs, the administrator had fraudulently allowed the same, and that by the allowance thereof, the assets of said estate in the hands of the administrator will be so reduced in amount as to render the estate unable to pay the legacy to the said *Mary Ayres*.

The complaint prays that the allowance of the claim of *Arnold* by the administrator, and the allowance of the receipt therefor by the court, be set aside, and the plaintiffs be permitted to contest the same, and for general relief. The jury found for the plaintiffs, and that there was due to said *Arnold* the sum of \$64 50, for funeral expenses paid by him, and for attention to deceased during her last illness. It will be observed that the complaint shows a sufficient interest in the plaintiffs, in the subject matter, to enable them to sue. It avers that the claim of *Arnold* was unjust and fraudulent, and that the administrator, knowing that fact, had fraudulently allowed it. It is urged that a copy of *Mary Bell's* will should have been made a part of the complaint. We do not think so. The alleged fraudulent conduct of the administrator, and not the will, is the foundation of the suit. But it is insisted that the plaintiffs have mistaken their remedy; that they should have appealed from the order of the Common Pleas Court, allowing the receipt of *Arnold* as a credit in favor of the administrator. The plaintiffs were certainly without remedy in that mode of procedure. They were not parties to the settlement or allowance by the court; there was nothing in the record, in that respect, that would enable this court, on such an appeal, to grant them any relief. But it is also urged that the suit should have been against the administrator, on his bond, and not to set aside the allowance of the claim. Perhaps the facts stated are sufficient to render the administrator and his sureties liable on his bond, but we think that is not the only remedy; on the contrary, we are of opinion that the remedy sought was not only a legitimate, but a very appropriate one. The motion in arrest was correctly

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overruled, and the judgment of the court below should therefore be affirmed.

The judgment is affirmed, with costs.

C. C. Nave, for appellants.

L. M. Campbell, for appellees.

STERLING v. KLEPSATTLE.

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SPECIFIC PERFORMANCE.—The rule that a court will not compel specific performance, unless it can, at the time, execute the whole contract on both sides, or, at least, such part of it as the court can ever be called upon to perform, is subject to some exceptions. In cases of contracts where the consideration is entire, but the performance separate, this rule does not always prevail.

SAME.—A sold to B a tract of land, and put him in possession, agreeing to execute to him, on payment of the purchase money, a title bond, conditioned for the execution of a deed, as soon as A got his deed. Suit by B to compel the execution of the title bond, alleging payment of the purchase money.

Held, that B was entitled to a decree for the specific performance of the contract.

APPEAL from the *Allen* Circuit Court.

GREGORY, J.—Suit by *Klepsattle* against *Sterling*, to enforce the specific performance of a contract. It is averred in the complaint that on the 15th of *February*, 1858, the plaintiff purchased of the defendant certain described land, for the sum of fifty dollars, and that the defendant put the plaintiff in possession of the premises, and agreed with him to execute a title bond therefor on the payment of the purchase money, conditioned for the conveyance thereof to the plaintiff as soon as the defendant got *his deed* for said land; that the plaintiff has fully paid the defendant for said land, and demanded the title bond, which the defendant refused to execute, &c.

A demurrer was overruled to the complaint. The defendant answered in two paragraphs, amounting substantially

to the general denial. Trial by jury; special findings, on which the circuit court decreed specific performance of the agreement charged in the complaint.

The evidence is in the record, and makes a strong case for the plaintiff; and the only question in the record is, has a court of equity power to decree the specific performance of such an agreement?

It is urged that this contract is one and indivisible, and therefore the plaintiff has failed to show that he is entitled to specific performance, as complete relief cannot now be obtained, the defendant not having the legal title to the land.

The rule that a court will not compel specific performance, unless it can, at the same time, enforce, the whole contract on both sides, or, at least, such part of it as the court can ever be called on to enforce, is subject to some exceptions.

In cases of contracts where the consideration is *entire*, but the performance *separate*, the rule does not always prevail.

The case of *Avery v. Langford*, 1 Kay's Reports, 663, was this: "In 1852, the plaintiff, *Avery*, was a general merchant, residing in *Boscastle*, in Cornwall, and trading in coals, timber, building materials, lime, corn, malt, manure, and other articles of general merchandise, and the defendant, *Langford*, was also a general merchant at *Boscastle*; and litigation having arisen between them as to the boundary of certain lands belonging to the plaintiff and defendant, it was compromised upon the terms contained in a written agreement, entered into between them in *March*, 1852, which were, in effect, that the plaintiff should purchase of the defendant, for the sum of £1600, all the defendant's lands at *Boscastle*, within certain limits, free from incumbrance; *Mr. Langford* to enter into bond conditioned to pay as liquidated damages to *Mr. Avery* the sum of £2000, if the said *Langford* be, after the 29th day of *September* next, concerned in any trading establishment within the district comprised between *Merwenstow* and *New Quay*, and

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Launceston and Bodmin. This was a suit by *Avcry* for specific performance of this agreement. Decree: specific performance, with costs; the form of the bond to be settled in chambers, if the parties differ." When it is remembered that a court of equity will restrain by injunction the violation of such an agreement, and perhaps decree specific performance, (*Beard et al. v. Dennis*, 6 Ind. 200,) this case bears a strong analogy to the case at bar.

Mr. Fry, in his work on Specific Performance, on the authority of the case of *Granville v. Betts*, 19 L. J. Ch. 32, says: "But where the contract is to do a thing, and to execute a deed for that purpose, and this deed is not merely incidental, but, so to speak, covers the whole of the executory part of the contract, the court will, it seems, enforce the contract by the execution of the deed, though the acts to be done be future, and to be done from time to time."

In the case of *Ogden v. Ogden*, 4 Ohio State Rep. 182, it was held that an agreement to execute a mortgage to pay money at a future day would be specifically decreed.

A deed of defeasance will be required to be executed, when, by fraud, accident, or mistake, the grantee has failed to execute it. 3 Atkyns 389; 2 *id.* 258; *id.* 99.

We take it for granted that the defendant, as he put the plaintiff in possession of the land, and agreed to make a conveyance when he got his deed therefor, was, at the time, the equitable owner of the land, with the right of possession, and as the record shows this, and that the defendant would not be entitled to his deed for some time thereafter, we think that a specific performance may be decreed. The purchase money being fully paid, a title bond, with the right of possession, will forever, under our statute, (2 G. & H., § 596, p. 283,) protect the plaintiff in his possession, and make the deed of conveyance more a matter of form than otherwise. We think substantial justice was done in this case. 2 G. & H., § 101, p. 122.

Trinler v. Cornelius.

The judgment is affirmed, with costs.

W. M. Crane and *W. S. Smith*, for appellant.

L. M. Ninde and *R. S. Taylor*, for appellee.

TRINLER v. CORNELIUS.

Where there is a clear conflict in the evidence, the Supreme Court will not disturb the finding below.

APPEAL from the *Floyd* Circuit Court.

GREGORY, J.—Suit by a landlord against his tenant for possession of the leasehold premises, commenced before a justice of the peace, and taken by appeal to the circuit court.

Trial by the court; finding and judgment for the defendant; motion by the plaintiff for a new trial overruled, and he appeals to this court.

It is claimed that the circuit court erred in overruling the motion for a new trial, because the finding was not sustained by the evidence.

There was an attempt to terminate the lease by one month's notice to quit, which, under the statute, can only be done where the tenancy is from month to month.

The plaintiff and his brother testify that the renting on the 21st of *January*, 1863, was from month to month, for \$25 a month. The plaintiff swears that he had made no other contract, but to increase the rent.

The defendant swears that he rented the premises, at that time, for a year, for \$300, payable in monthly instalments; and that in *February*, 1864, he made a contract for another lease of the premises for two years, at \$450 a year, payable in like manner; that the latter lease was to have been reduced to writing; that it was drawn up, but not signed, the plaintiff making some objection thereto, as to

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the stipulations therein as to some improvements to be made; but that he nevertheless occupied the premises, made the improvements agreed on, and paid from month to month the increased rent.

The defendant is strongly corroborated by *Knapps*, *Lafollette* and *Green*, disinterested witnesses.

A number of witnesses swear that the characters of the two *Trinlers*, who testify for the plaintiff, are bad; a larger number, however, swear that their characters are good.

On the main question of fact involved in this case there is a clear conflict in the evidence, and under the well known rule, we cannot disturb the finding of the court below.

The judgment is affirmed, with costs against the appellant.

J. H. Stotsenburg and *T. M. Brown*, for appellant.

T. L. Smith and *M. C. Kerr*, for appellee.

LEWIS v. PRENATT and Others

GARNISHEE—ESTOPPEL.—Proceedings in attachment. Answer by the garnishee that he was not indebted to the attachment defendant. Reply, by way of estoppel, that the garnishee, before the suing out of the writ of garnishment, had admitted to plaintiff that he was indebted to the attachment defendant, and that, if garnisheed, he would pay the money to the plaintiff. Demurrer to the reply overruled. In the Supreme Court the plaintiff, after joinder in error and submission, pleaded to the assignment of errors that, upon the trial below, the garnishee was permitted to offer evidence that he was not indebted to the attachment defendant.

Held, that the plea filed to the assignment of errors would require the Supreme Court to go outside of the record, and hear oral proof of the proceedings of the court below, which cannot be done. Page 99.

Held, also, that the facts set up in the reply did not estop the garnishee from denying an indebtedness to the principal defendant.

APPEAL from the *Jennings* Common Pleas.

FRAZER, J.—This was a proceeding against *Lewis*, as garnishee. He answered, denying all indebtedness, &c., at any

time, to the principal defendant in the suit. To his answer the plaintiffs replied, in estoppel, that before the filing of the affidavit in garnishment, he admitted and represented to the plaintiffs that he had made a certain purchase of property of one *Bingham*, which really belonged to the principal defendant; and that a portion of the purchase money remained unpaid; and that if the plaintiffs would garnishee him, *Lewis*, he would pay the same to the plaintiffs, by means of which, before *Lewis* paid such purchase money, the plaintiffs were induced to, and did, prosecute the proceedings in garnishment, &c. *Lewis* demurred to this reply; his demurrer was overruled, and upon this ruling error is assigned, and this is the only question arising upon the record of the court below. But, before proceeding to its consideration, there is a novel question of practice in this court which must be disposed of.

The appellee joins in error, and, after submission, pleads specially to the assignment of error, and in bar thereof, that, upon the trial below, *Lewis* was permitted to offer evidence that he was not indebted to the principal defendant, whereby the plaintiffs were deprived of the benefit of their estoppel. The appellant moves to strike out this plea. The issue of fact which it tenders would involve an investigation here, to ascertain by oral proof what evidence was admitted in the court below; and, as the record does not show any objection by the appellees to any evidence offered below by the appellant, in consequence of which we must presume that no such objection was made, we have the appellee claiming here that he virtually withdrew his reply in estoppel. This course of practice has never, that we are aware of, been attempted in a court of errors. For what was done in the court below, we must look only to the transcript of its record. Every part of its action can thus appear, if the parties avail themselves of the use of bills of exception; and where this has not been done, it would be strange if the omission can be supplied by making issues of fact here, upon the trial of which we are to learn what was done below. We

cannot inaugurate such a practice, and, accordingly, we direct the second paragraph of the appellees' answer here to be stricken out. Indeed, we would do this on our own motion, or wholly disregard it.

We now come to the question in the record. The matter alleged by way of estoppel, falls very far short of being such. It consists merely of the admissions of the garnishee, and that the plaintiffs were induced thereby to commence their proceedings against him as garnishee. When, by the admission of a fact, which is not true, one draws another into a line of conduct from which he cannot recede, and which must result to his injury, if the fact be otherwise than it was represented, the party making the admission will not afterward be permitted to show the truth to be otherwise, for the reason that he would thereby perpetrate a fraud upon the party whom he had misled.

It is difficult to see how the doctrine could apply against a garnishee, as such. He must answer under oath, and to estop him from answering truly would be to require him to commit perjury. And then the proceeding seems designed to enforce only the rights of the principal defendant against the garnishee, and apply them to the satisfaction of the plaintiff's demand against him; and is not, probably, designed to enable the plaintiff to compel the performance of additional obligations which have arisen in his own behalf against the garnishee. But we need not, and do not, place the present decision upon either of the grounds last alluded to. It is sufficient that the facts pleaded do not, at any rate, constitute an estoppel. The plaintiff parted with no right, and relinquished no security; he stood exactly as he did before the appellant made the representations to him, in all his relations with the whole world, except that he commenced his proceedings of garnishment, and thereby incurred costs. And the record informs us that the appellant at once offered, in open court, to repair the injury by confessing judgment for such costs. We think that the demurrer should have been sustained.

 Smith v. The State.

The judgment is reversed, with costs, and the cause remanded, with directions to proceed according to this opinion.
C. E. Walker and *H. C. Newcomb*, for appellant.
S. Major, for appellees.

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 SMITH v. THE STATE.

COUNTY COMMISSIONER—RESIDENCE OF.—The statute does not require that a member of the board of county commissioners should continue to reside in the district of the county for which he was elected.

APPEAL from the *Jay* Common Pleas.

RAY, J.—These proceedings were instituted by the prosecuting attorney for the district, by information, in the nature of a writ of *quo warranta*, against the appellant, to obtain a judgment of ouster from the office of county commissioner, because said appellant had, since his election to, and qualification for, said office, removed out of the district in which he resided, when so elected and qualified, into another district in the said county. A motion to quash was filed and overruled. This was followed by a demurrer to the information, which was also overruled. An agreed statement of facts was then filed, and the cause submitted to the court for trial. A finding against the appellant, and a judgment of ouster, were rendered, and upon the overruling of a motion for a new trial, this appeal was taken.

The act "providing for the organization of county boards, &c.," 1 G. & H., § 2, p. 248, directs that "each county shall be divided into three districts, numbered one, two and three, * * * by the board of county commissioners at their first session after the publication of this act; and one commissioner shall be elected from the residents of each of such districts, by the voters of the whole county."

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Under this provision it was held by the court below, that although the express requirement of the statute had been complied with, and a resident of the district elected by the voters of the whole county, yet after such legally elected person had been duly qualified, his removal to another district of the same county operated to vacate the office.

It will be observed that the section of the statute under consideration does not require a continued residence in the district, but is fully satisfied with the qualification attaching to the person selected at the time his election becomes effective, and he assumes the duties of the office. At that time he takes an oath of office, and assumes duties and a jurisdiction co-extensive with the limits of the county. The previous residence within a particular district has secured in the candidate a local knowledge of the peculiar wants and requirements of that district, and the legislature have deemed this sufficient, without requiring a continued residence within the same limits.

The selection of one from each of the three districts of the county, would prevent an election of commissioners with a special view to the peculiar wants of any one locality in the county, and it seems to be assumed by the statute that impartiality, in regard to the several districts, having been secured in the selection of officers, the oath of office will be a sufficient security, in the future, against local influence operating to the prejudice of the general good.

The sixth section of article 6, of the constitution, provides that "all the county, township and town officers shall reside within their respective counties, townships and towns." The additional restriction which, it is insisted, is imposed by statute, that certain county officers shall reside within a more limited locality than required by the constitution, should clearly appear, and we cannot, by mere inference from what the statute says, as to what the legislature might or might not have intended, determine that such limitation exists. The constitution provides, in regard to

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the judges of the Supreme Court, that "one of said judges shall be elected from each district, and reside therein." The same instrument also provides that "a judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit." When it is thus plain, that it was considered necessary to insert this requirement upon these officers in the constitution, an instrument declaratory of general policy, and whose brevity forbids the application of that policy to special cases, in which the courts would make such application as was indicated by the general tenor of the instrument, it would hardly seem authorized in the courts to imply from a statute a limitation not therein expressed, when the constitution had already imposed a restriction upon the same persons, in regard to the same subject matter.

At all events, we do not think the legislative intent is so clearly indicated in the statutes, nor the public necessity so urgent, that we would be clear from a well founded charge of judicial legislation, if, by construction, we hold such restriction to exist in the section of the act cited.

The judgment of the court below will be reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the information.

Templer and McCoy, for appellant.

J. J. Hawkins, for the state.

THE CINCINNATI AND CHICAGO AIR LINE RAILROAD COMPANY
v. RODGERS.

PRACTICE.—The Supreme Court will disregard all defects in the pleadings which do not affect the substantial rights of the adverse party.

DAMAGES.—A party is liable for all the damages which are the proximate result of his violation of his contract; but the other party is bound to use due diligence in preventing loss.

The Cincinnati and Chicago Air Line Railroad Company v. Rodgers.

APPEAL from the *Madison* Circuit Court.

GREGORY, J.—Suit by *Rodgers* against the *Railroad Company* to recover damages for the violation of a contract for the transportation of hay, from certain points on the line of the defendants road to *Cincinnati*.

The complaint contains seven paragraphs, to the first of which the court sustained a demurrer, and overruled separate demurrers to the other six.

The defendant answered in two paragraphs: 1st, general denial; 2d, a special denial of the contract, as alleged in the complaint. Reply to the second paragraph of the answer. Trial by jury; verdict for the plaintiff for \$1042; motion for a new trial overruled, and judgment. The evidence is in the record.

There is no exception taken to the instructions to the jury. It is insisted by the counsel for the appellant that the court erred in overruling the demurrer to several of the paragraphs of the complaint. There are several good paragraphs in the complaint, to which the evidence, in our opinion, properly applies. We are bound to disregard defects in the pleadings which do not affect the substantial rights of the adverse party. 2 G. & H., § 101, p. 122.

The appellant contends that the damages are excessive. The defendant was liable for all the damages which were the proximate result of his violation of the contract. It was the duty of the plaintiff to use due diligence in preventing loss; but we are bound to presume that the court properly instructed on this, as well as all other points in the case, and the evidence is such as to justify the finding of the jury.

The judgment is affirmed, with one per cent. damages and costs.

J. Davis, for appellant.

W. March, for appellee.

Kirland v. Robinson and Another.

KIRLAND v. ROBINSON and Another.

EXECUTION—LEVY OF.—After an execution in the hands of the sheriff has been levied on property, he has a right to proceed with the collection thereof, until legal steps are taken to arrest his action in the premises, and he is not bound to take even the receipts of the judgment plaintiff.

SHERIFF'S POUNDAGE.—Where the judgment defendant, for the purpose of inducing the attorney of the judgment plaintiff to accept the money, promises to pay the costs, the sheriff is entitled to his poundage.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—The appellant was the plaintiff, and the appellees were the defendants. The facts alleged in the complaint are as follows: On the 27th of *February*, 1861, *Morris*, one of the defendants, recovered a judgment in the *Marion* Common Pleas Court, against *Kirland*, for \$10,727 and costs. An execution was issued on this judgment, and directed to the sheriff of *Marion* County. There were payments endorsed on the execution to the aggregate amount of \$4,900, and a payment of all costs, except \$14. On the 9th of *May*, 1863, the sheriff levied on certain real estate of *Kirland's*, and advertised it for sale on the 5th of *June*, then next following. After the levy, and before the day of sale, *Kirland* made the following payments to *Robert B. Duncan*, the attorney of *Morris*, viz: *May* 13th, 1863, \$5,500; *May* 18th, 1863, \$1,621 85; making \$7,121 85, which was in full of the principal and interest due thereon; but leaving costs due on the execution to the amount of \$30, which he, *Kirland*, tendered to the sheriff in full of all costs, and requested him to return the execution; but he refused to do so, unless *Kirland* would, in addition to the \$30, pay the further sum of \$75 71, being half commission on the \$7,121 85, paid by *Kirland* to *Duncan*. The sheriff not only refused to return the execution, but threatened to sell the premises under the advertisement. It is averred that the money paid to *Duncan* was not collected by the sheriff, and the relief sought is that the sale be enjoined, &c.

Kirland v. Robinson and Another.

Morris answered, admitting the payments set forth in the complaint, but alleging that they were made upon the express understanding that *Kirland* should pay the costs remaining unpaid on the judgment and execution, and that, until such costs were fully paid, the sale upon the execution should not be stayed, but should proceed to satisfy such costs.

Robinson, the sheriff, answered that after he had levied the execution upon the property, *Kirland* made the payments alleged in the complaint, to *Duncan*, the attorney of *Morris*, upon the same understanding set forth in the preceding answer; and further, *Robinson*, in his answer, sets up that before *Kirland* made the payments, he, as sheriff, had made the levy, and advertised the property for sale, and that there was reasonably due to him, besides the costs charged on the execution, one-half of the fees allowed for money paid on sales of property by the sheriff; and he prayed judgment in his favor for the amount of costs to which he was entitled, &c. The plaintiff demurred separately to the answers; but the court overruled the demurrers, refused the injunction, and, in accordance with the prayer of the sheriff, rendered a judgment in his favor for \$104, &c.

Was the sheriff entitled to commission on the money paid by the execution defendant to the attorney of *Morris*?

The answer to this question depends upon the interpretation to be given to the statute regulating fees, (1 G. & H., § 5, p. 381,) allowing a sheriff who sells "property on execution, a commission of five per centum on the first three hundred dollars, and two per centum on any excess above that amount; but when the money is paid to him without sale, one-half commission only shall be allowed."

It is insisted that the money was not paid to the sheriff, and therefore he is not entitled to his poundage.

We think the facts set up in the answer show a substantial payment to the sheriff, within the meaning of this clause of the statute.

After an execution in the hands of the sheriff has been levied on property, he has a right to proceed with the collection thereof, until legal steps are taken to arrest his action in the premises. He is not bound to take even the receipts of the judgment plaintiff.

The judgment defendant can legally pay the money to the sheriff, in answer to the demand of the writ. The judgment plaintiff may accept the money upon ordering in the execution, and if he do so, it might be insisted that the sheriff would not be entitled to his poundage, a point we do not decide. But in a case like the one at bar, where the judgment defendant, for the purpose of inducing the attorney of the judgment plaintiff to accept the money, promises to pay the costs, it seems clear to us that the sheriff is entitled to his poundage.

This opinion is not in conflict with the case of *Miles v. Ohaver*, 14 Ind. 206. There is a material distinction between the payment before, and after, levy. In the latter case, the levy is a satisfaction of the execution, at least to the value of the property levied on, until the levy is legally disposed of; in the former case, it can not be said that the officer has executed the writ.

The judgment is affirmed, with five per cent. damages and costs.

J. T. Dye, for appellant.

L. Barbour, J. D. Howland, T. A. Hendricks, O. B. Hord and *W. P. Fishback*, for appellees.

WINTON and Others v. CONNER.

| 24 107
| 166 368

Opinion on Petition for Rehearing.

REVERSAL—COSTS.—Where a cause is reversed in the Supreme Court for error occurring on the trial, as in the giving of instructions to the jury, the reversal extends back to the issue, and makes a new trial necessary, and hence, under the statute, (sec. 578, 2 G. & H., 277,) the reversal carries the costs of the trial below.

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APPEAL from the *Wabash* Circuit Court.

ELLIOTT, C. J.—This was a proceeding in the Circuit Court, by *Conner*, the appellee, against the appellants, for an injunction and the taxation of costs.

Our predecessors affirmed the judgment of the Circuit Court, saying: "This is a mere question of costs. The judgment below is affirmed."

The case is now presented to us, on a petition by the appellants for a rehearing, and we deem it proper, in answering the petition, to examine the questions involved.

The facts of the case, so far as they relate to the questions presented by the record, are these: *Conner* sued *Winton* for unskillfully doctoring a horse, and recovered nominal damages. *Conner* appealed the case to this court, where the judgment below was reversed, with costs, in consequence of an erroneous instruction given by the court to the jury, and the cause was remanded to the Circuit Court for further proceedings. 8 Ind., 315.

Upon the return of the case to the Circuit Court, *Conner* dismissed it, and moved the court "to tax the costs accrued in the case, up to the reversal of the cause by the Supreme Court, against said defendant," which motion the court overruled, and "adjudged all costs against said plaintiff which accrued previous to the point of error at which the Supreme Court reversed the case, and also such as accrued after remanding and docketing the same in this court," and further ordered that all costs that accrued subsequently to the first error should be taxed against *Winton*.

From these rulings *Conner* again appealed to this court, where the judgment below was affirmed. 10 Ind. 25.

Under these orders of the Circuit Court, the clerk taxed against *Conner* all the costs in the case up to and including all the costs of the trial, witness fees and the jury fee, except twelve cents for recording the verdict, and twenty cents for entering the judgment. The complaint in this case is filed by *Conner*, alleging that the clerk had issued a fee bill against him, for the costs so taxed, and placed the

same in the hands of the defendant, *Thomas*, the sheriff, commanding him to levy and collect the same of the property of said *Conner*; and that the said sheriff was about to seize upon his property to satisfy the said fee bill. The complaint prays an injunction against the sheriff, and for a proper taxation of the costs, the items of which, as contained in the fee bill, are made part of the complaint.

On the final hearing, the court below taxed all the costs of the original trial, including the witness fees and the clerk's costs for the subpoenas for the witnesses, and the sheriff's fees on said subpoenas, to *Winton*. The defendants below appeal.

The appellants insist that the record shows that the case is *res adjudicata*; that the questions involved were fully adjudicated by the circuit court at the time of the rendition of the judgment upon the dismissal of the case by *Conner*, and in the affirmance of said judgment by this court. We do not think the position is sustained by the record. It does not appear that the items of costs were then before the court for taxation. The court was only asked to render a proper judgment for costs, or, in other words, to settle, in the final judgment, the proper rule for their taxation, which the court seems to have done, as the language of the order was construed by this court in affirming it.

The court below, in the proceeding before us, did not set aside, or assume to set aside, the order directing how, and to whom, the costs should be taxed; but only assumed to properly tax them under the order; and if that is the legal effect of the action of the court, then certainly the case is not *res adjudicata*.

The order of the court is, substantially, in the language of the statute, and subject to the same construction. In fact, the whole question involved here, depends upon the construction to be given to the statute. Section 573, of the code, 2 G. & H., p. 277, reads thus: "When the judgment is affirmed in whole, the appellee shall recover costs; and

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when the judgment is reversed in whole, the appellant shall recover costs, in the supreme court and the court below, to the time of the first error, for which the judgment is reversed, which shall be pointed out in the opinion of the supreme court," &c. Now, what construction is to be given to the words "*to the time of the first error*," as applied to the *trial* of the cause? Does it mean the particular period of time in the progress of the trial, or is the whole time occupied by the trial to be regarded as one stage in the proceedings, and the time consumed therein as covering but one period? The appellant insists that in such a case the reversal only carries the costs back to the particular point of time in the trial when the first error occurred. But great difficulties would seem to present themselves in the practical application of the statute under this rule. Another section of the same statute, we think, has an important bearing on the construction to be given to the one just quoted. Section 569, p. 276, enacts that "the supreme court may reverse or affirm the judgment below, in whole or in part, and remand the cause to the court below; but the court shall not reverse the proceedings, *any further than to include the first error*." Now, in the case at bar, the first error—the one for which the judgment was reversed—occurred near the close of the trial, in the charge of the court to the jury, and the same rule of construction contended for by the appellants, if applied to the section last quoted, would prevent the court from reversing the proceedings beyond the point of time in the trial when the erroneous instruction was given. The trial in such a case, however, is indivisible; it is, in legal contemplation, a unit; and, therefore, under such a construction, the statute would prove a total failure, in its practical application. Hence it is the settled rule of practice, in such cases, that the reversal is made to extend through the entire trial to the issue, and directs a trial *de novo*. And we think it was the intention of the legislature, that the right to recover costs should

travel with the reversal, through the record, to the same common point.

This view is in accordance with the previous rulings of this court. In the case of *Doyle v. Kiser*, 8 Ind. 396, a prior judgment had been reversed by this court, for error occurring during the trial, and this same question of costs subsequently arose in the court below, and was appealed to this court. In deciding the case, the court said: "The reversal of the cause, when formerly before this court, extended back, through the trial in the circuit court, to the issue," and then, after quoting § 573 of the statute, the court adds, "We think, under this statute, the reversal carries costs in favor of the party obtaining it, to the point to which the reversal is made. We think such was the practice under the former statutes, (*Andrews v. Hammond*, 8 Blackf. 540,) and that it should be continued under the present. The plaintiff below should have been taxed with the costs incident to the trial through which the reversal extended." The case was again brought to this court on the same question of costs, and is reported in 12 Ind. 474. The court says: "Where erroneous instructions of the court to the jury, upon the trial of a cause, constitute the error for which the judgment in the cause is reversed by the supreme court, such error will, as a general rule, render the whole trial an error, so far as to compel a reversal back through the trial to the issue. It renders a second trial of the issue necessary. Such was this case; and the reversal carried the costs of the erroneous trial had, by the express terms of the decision in 8 Ind. 396."

The learned counsel for the appellants attempts to deny the authority of this case, by saying that this court did not, and could not, decide anything that was not before them, and insists that the first error, for which the judgment was reversed, was in the improper admission of evidence, and not in charging the jury, and, therefore, the case is distinguishable from the one at bar, "because the court does not preserve, by record, the time in a trial when a particular

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witness is examined," &c. Without admitting the correctness of the statement as to the error for which that case was reversed, we think it does not alter the rule laid down. The learned counsel seems to have overlooked the fact that the rule of decision laid down by the court is not based on the particular *period of time*, in the trial, when the first error occurred; but upon the fact that, if the reversal is carried back through the whole trial to the issue, it carries the costs of the trial back to the same point to which the reversal extends, i. e., to the issue. It is not denied but that the case was reversed for an error occurring during the trial, and that the reversal extended back through the whole trial to the issue, and required that a new trial should be had. Such also was the case at bar, and the same rule would seem to apply.

In the affirmance of the order of the court below, as to costs, on *Conner's* second appeal to this court, 10 Ind. 25, PERKINS, J., in delivering the opinion of the court, said: "This case was reversed in the supreme court, and remanded. In *Doyle v. Kiser*, this court said that, 'the reversal carries costs in favor of the party obtaining it, to the point to which the reversal is made,' and that where the reversal extends back to the issue of fact tried, the *costs of the trial* are carried by the reversal. Such is the rule. * * * * * In the case now before us, the bill of exceptions states that the court adjudged all costs against said plaintiff which accrued previous to the point of error at which the supreme court reversed the case. The court below seems to have been acting upon the correct rule," &c. The court affirmed the case, and, evidently, for the reason that the court below acted upon the correct rule, that is, upon the rule that, "where the reversal extends back to the issue of fact tried, the costs of the trial are carried by the reversal. Such was the construction given by this court to the language used in the judgment, or order of the court below, and hence the case was affirmed. The subsequent difficulty, however, seems

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to have arisen by the acts of the clerk, in disregarding the order of the court, and taxing the costs of the trial to *Conner*, instead of the defendant.

The costs taxed by the court below were all incident to the trial, and, under the rule laid down, we think, properly taxed to *Winton*.

The remedy adopted was a proper one, under the circumstances of the case. The fee bill, it is alleged, was in the hands of the officer, who was threatening to levy it on *Conner's* property; to prevent which, he prayed an injunction and a proper taxation of the costs. The latter prayer in the complaint was, in effect, a *motion* for that purpose.

We think the action of the court below was correct, and therefore overrule the petition for a rehearing.

GREGORY, J., was absent.

J. U. Pettit, for appellant.

BROWN v. THE STATE.

SALE OF LIQUOR TO MINORS—EVIDENCE.—In a prosecution for selling intoxicating liquor to a minor, the defendant asked the prosecuting witness to whom the liquor was alleged to have been sold, whether he had not voted at the general elections for two years past.

Held, that the evidence sought by the question was proper: 1st. To impeach the statement of the witness that he was a minor; and, 2d, as tending to show that defendant sold the liquor in the *bona fide* belief that the party was of age.

APPEAL from the *Marion* Circuit Court.

ELLIOTT, C. J.—Indictment for selling intoxicating liquor to a minor. Plea, not guilty; trial, conviction and judgment for the state. The defendant appeals.

The principal questions discussed in this case were ruled upon, and decided in favor of the state, in *Hingle v. The State*, at this term, and will not be further noticed here. One other question, however, is raised here, requiring a decision.

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William F. Little, the prosecuting witness, and person to whom the intoxicating liquor is alleged to have been sold, testified that he would be twenty-one years of age on the 29th day of *July* then next. The defendant, upon cross examination, asked the witness whether he wore his beard at the time he purchased the liquors testified to by him, as long as it was at the time of the trial; at the same time calling attention to the fact that the witness' beard was thick set and long. The witness answered that "he did." The defendant then asked the witness "whether he had not voted for the last two years?" but the Court refused to permit the witness to answer the question, to which the defendant excepted.

This was error. We think the question was a proper one, and the fact intended to be elicited by it pertinent and legitimate, for two purposes.

First. One of the material facts necessary to be shown, to justify a conviction of the defendant, was that *Little* was under the age of twenty-one years at the time he purchased the liquor. He had sworn to that fact on his examination in chief, but his statement so made was not conclusive on the defendant; he had the right to rebut it, or discredit it, and it was certainly legitimate for him to test its correctness on cross examination, by such questions as might tend to discredit the statement, or show that it was not true in fact. We do not say that an affirmative answer to the question would necessarily have had that effect, but that it was legitimate evidence as tending to rebut the statement of the witness as to his age, we think is very clear.

It was proper for another reason. The defendant had the right to show in defense that he sold liquor to *Little* in good faith, believing at the time that he was over twenty-one years of age; and if *Little* had claimed and exercised the right to vote at the elections for two years prior to the time of the sale of the liquor to him, and that fact was known to the defendant at the time of the sale, it would certainly be a strong circumstance tending to show that the defendant

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did, in good faith, believe him to be of age at the time of the sale. The question asked did not go to the point that the defendant knew that *Little* had voted, but it was legitimate as laying the proper foundation for another question on that subject, or the proof of his knowledge of the fact by other evidence.

The judgment is reversed, and the cause remanded for a new trial.

J. W. Gordon, for appellant.

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APPEAL from the *Marion* Circuit Court.

ELLIOTT, C. J.—Five cases, for selling intoxicating liquor to a minor, Nos. 3766, 3767, 3768, 3813 and 3814. In all of these cases the same question precisely is presented as in the above cases of the same appellant v. *The State*, and they are, therefore, all reversed for the reason given in that case.

J. W. Gordon, for appellant.

ROOT v. STEVENSON'S ADMINISTRATOR.

24b	115
137	572
24	115
Case 3	
d164	600

ARMY REGULATIONS.—The army regulations are, by the act of Congress of August 23, 1842, made the law of the land. Page 118.

CONTRACT AGAINST GOOD MORALS—INFANCY.—A and B entered into a partnership with C, who was an assistant quartermaster of the United States, by which they were to furnish forage for the use of the army, which was to be purchased of the firm, and inspected and received by C, as such quartermaster. At a settlement of the business, the profits of each partner being \$1800, B, in whose hands they were, paid over to C the share of A, to be delivered to him by C. Suit by A, alleging a conversion of the money by C.

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Held, that, as the contract was in contravention of good morals, and based on the corruption of a public officer, the court cannot lend its aid to enforce it, but must leave the parties as it found them.

Held, also, that the corruption of the transaction still tainted the fund in the hands of C, though the partnership business had been closed, and A's action to recover it cannot be sustained.

Held, also, that a plea of infancy by C was good, as the bailment was of money generally, and not of specific bills or coins, and the failure to pay over was only a non-feasance.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—*Deloss Root* sued *Columbus S. Stevenson*, administrator of the estate of *Richard Stevenson*, deceased, for \$1300. There were two paragraphs in his complaint. The first was for money had and received by the intestate for the use of the plaintiff, and money loaned by the plaintiff to the decedent. The second charges that, in the summer of 1862, the plaintiff, said *Richard*, and one *Cheatham*, entered into an agreement to purchase supplies for the federal army at Nashville, for a limited time, by which *Cheatham* was to make the purchases, keep and pay out the moneys used in the business, and when the same expired, to settle the liabilities and divide the net profits equally between the three, and pay over to each his separate share of the same. That the joint undertaking was carried on until the 6th of *September*, 1862, when the same was terminated, and *Cheatham*, after settling the liabilities, had left as profits \$3900, which he divided into equal portions, giving to each of the partners \$1300, and which sum of \$1300 belonging to the plaintiff, and \$1300 belonging to said *Richard*, he then had and held in his hands as the separate property of each, and so having and holding the same, he did pay over to said *Richard* the \$1300 belonging to, and the separate property of, said *Richard*, and did also deliver over and pay to said *Richard* the \$1300 which he, *Cheatham*, had in his hands as the separate property of the plaintiff, and which last mentioned money said *Richard* received as the separate property of the plaintiff, to be by the former paid over and delivered to the latter; but said *Richard*

did not pay nor deliver the money, nor any part thereof, to the plaintiff, but so to do wholly failed, and *wrongfully converted* the same, and every part thereof, to his own use. That at the time the agreement was entered into, and at the time the money of the plaintiff was paid over and delivered to said *Richard*, for the purpose aforesaid, the said *Richard* was a minor, under the age of twenty-one years, to-wit, of the age of twenty years, of which fact the plaintiff was wholly ignorant at and during the time; and that defendant, administrator, &c., has not since the death of the said *Richard* paid the money, nor any part thereof, to the plaintiff, although often specially requested, before the commencement of this suit.

The defendant's demurrer to the second paragraph of the complaint was overruled, and he excepted.

The defendant answered each paragraph of the complaint separately: 1st, general denial; 2d, infancy; 3d, that *decendent*, *Root* and *Cheatham* were partners in purchasing supplies for the government; that *Stevenson*, the decedent, was at the time assistant quartermaster in the army of the United States, and purchased of the firm, inspected and received the supplies, as such quartermaster, and that the \$1800 sued for by *Root* was his share of the profits.

The plaintiff demurred separately to the second and third paragraphs of the answer to each paragraph of the complaint; his demurrers were overruled, and he excepted. The plaintiff replied to the second and third paragraphs of the answer to the first paragraph of the complaint: 1st. General denial. 2d. That at the time the said *Richard* received the money of the plaintiff, the partnership was closed, and that *Cheatham* delivered the money as the separate property of the plaintiff to said *Richard*, for the use of, and to be by him paid over to, the plaintiff, and the same was so received by said *Richard* for such purpose, who, at the time, and for a long time before, had been doing business for himself, and was not known to be a minor by the plaintiff, or by *Cheatham*. 3d. The same as the 2d, omitting the averments relating to

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the minority of the decedent. 4th. The same as the 3d, with the additional averment that the partnership was limited to a single transaction.

The court sustained separate demurrers to the 2d, 3d and 4th paragraphs of the reply, and the plaintiff excepted.

The plaintiff withdrew the 1st paragraph of his reply, refusing to reply further, and the court rendered final judgment against him. He appeals to this court.

The answer shows that the plaintiff entered into partnership with *Cheatham* and the defendant's intestate, who was at the time assistant quartermaster at *Nashville, Tennessee*, to purchase forage for the army. The forage purchased by the partnership was purchased from the firm, inspected and received by the deceased, as such assistant quartermaster. The reply shows that the net profits of the adventure were \$3900, which, after the termination of the partnership, *Cheatham* divided into three equal parts, and delivered and paid over to the decedent \$2600, one-half of which he was to pay over to the plaintiff. It is not shown that the plaintiff was a party to the settlement, or consented thereto, except by the bringing of this action. Can the plaintiff recover the \$1300 so placed in the hands of the deceased?

It is provided by the Army Regulations that "No officer disbursing, or directing the disbursement, of money for the military service, shall be concerned, directly or indirectly, in the purchase or sale, for commercial purposes, of any article intended for, making a part of, or appertaining to the department of the public service in which he is engaged, nor shall take, receive or apply to his own use any gain or emolument, under the guise of presents or otherwise, for negotiating or transacting any public business, other than what is or may be allowed by law." §1000. The Army Regulations are by the act of Congress of the 23d of August, 1842, made the law of the land. See also *Gratiot v. United States*, 4 Howard, 80.

A contract was made for rebuilding *Fort Washington* by M, a deputy quartermaster-general, with B, in the profits of

which M was to participate. False measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury. A bill was filed to compel an alleged partner in the contract to account for and pay, to one of the partners in the transaction, one-half of the loss sustained in the execution of the contract. It was held, that to state such a case was to decide it. "Public morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court." *Bartle v. Nutt*, 4 Peters, 184.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of the *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers to shift the loss from one to another, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law." *Ibid.*

We are inclined to think that the only difference between that case and the one at bar, consists in a fact which would have alone received the condemnation of a Spartan, the *detection* and not the *commission* of the crime.

But it is claimed that the illegal partnership had terminated; that the contract of bailment was a new one, based on a new consideration, and therefore not tainted with the illegality.

This position cannot be maintained. *Root* had never, in any legal sense, received his share of the ill gotten gains. *Stevenson* was not his agent in the receipt of the money. *Cheatham's* obligation was to divide and pay over. This bailment was resorted to as the very means of performing his obligation under the partnership agreement. By the want

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of good faith in one, in equal guilt with himself, he is subjected to a loss of the identical thing which he had acquired by a violation of every moral principle. The law, be it said to its credit, leaves the guilty man where it finds him.

The rule on this subject is thus stated in the case of *Armstrong v. Toler*, 11 Wheaton, 258: "I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it." This ruling received the approbation of Chief Justice MARSHALL, and is sustained in the case of *Steers v. Lashley*, 6 Term Rep. 61, and *Booth v. Hodgson*, *Ibid.* 405.

The defense of infancy becomes immaterial, there being nothing to defend against.

It may, however, be remarked, that the only point of any importance on this branch of the case, arises on the answer of infancy to the 2d paragraph of the complaint. It is contended that infancy is not a good defense to that paragraph, because a "wrongful conversion" of money is charged; and while it is admitted that there was a contract of bailment with the infant, it is insisted that the conversion of the money was outside of his duty as bailee, and rendered him liable for the *tort*, and the case of *Towne v. Wilcy*, 23 Vermont, 855, is cited, in which it is held that "when property is bailed to an infant, his infancy is a protection to him for any non-feasance, so long as he keeps within the terms of the bailment. But when he *departs from the object* of the bailment, it amounts to a conversion of the property, and he is liable to the same extent as if he had taken the property in the first instance without permission." In that case the infant hired a horse for the purpose of going to B, and returning the same day. He went to B, but returned by a circuitous route, which nearly doubled the distance, and stopped at a house upon the way, leaving the horse without food or

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shelter from 8 o'clock in the evening until 4 o'clock the next morning, and did not return until 8 o'clock the next morning, and from this over driving and exposure the horse died.

The bailment in the case in judgment was of money generally, and not of any particular coin, money in a bag, or specific bills. The infant could have discharged himself by paying the plaintiff \$1800, without delivering the specific money bailed. Proof on the trial of a demand and refusal to pay, would have sustained the allegation, and, after all, the averment in this particular case amounts to nothing more than a non-feasance, for which infancy is a protection. The rulings of the court below were right.

The judgment is affirmed, with costs against the appellant.

N. B. Taylor, for appellant.

Rand & Hall, for appellee.

GOODWIN v. HEDRICK.

TRIAL BY JURY—WAIVER OF.—Any agreement of parties, entered of record, by which they consent to any disposition of the cause plainly inconsistent with its submission for trial by jury, will constitute a waiver of the right to such a trial.

SAME—REFEREE.—The agreement to refer a cause, and that the referee shall hear the evidence, and try and determine all the matters in controversy between the parties, is totally inconsistent with its submission to jury, and is a waiver of a jury trial.

QUERE.—Whether an entry of record is a sufficient "written consent" to a trial by a referee, under sec. 349, 2 G. & H. 210.

PRACTICE—SUBMISSION TO REFEREE.—If the regularity of the submission to the referee was not questioned in the court below, the Supreme Court will presume the submission to have been made "upon the written consent of the parties."

Goodwine v. Hedrick.

APPEAL from the *Warren* Circuit Court.

RAY, J.—Action in the court below by *Hedrick* against *Goodwine*. After the issues were formed in the case, the following entry appears in the record:

“Come now the parties, in person, and by their attorneys, and agree in open court that the court may refer this cause, and appoint a referee to hear the evidence, and try and determine all the matters in controversy between the parties; and that the decision of the referee have the force and effect of a finding by the court. Upon the filing of the report the court shall render judgment on such finding. The court thereupon appoints *Sydney Cronkhite* such referee; and orders him to report to this term his finding.”

This order was entered on the eighth judicial day of the term. After the report of the referee was submitted to the court, *but before the same was filed*, the appellant, *Goodwine*, asked and demanded a trial by jury, which the court refused to grant. The refusal of the court to grant the appellant a trial by jury is the error complained of, and for which a reversal of the cause is asked in this court.

The first question presented for decision in this case is, whether the appellant has waived his right to have the cause tried by a jury.

The statute prescribes the methods in which such waiver may become effective. Among other modes, it declares it may be done “by oral consent in open court, entered on the record.” In our opinion, the entry in this case clearly contains such a waiver. The words, “a trial by jury is waived,” are not technical, but any agreement of the parties, entered of record, consenting to any disposition of the cause plainly inconsistent with its submission for trial by a jury, will constitute a waiver of the right to such a trial. The agreement to refer the cause, and that the referee shall hear the evidence, and try and determine all the matters in controversy between the parties, is totally inconsistent with its submission to a jury, and is a waiver of such trial.

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The appellant insists, however, that the cause was never referred in the method required by the statute, and that, therefore, the referee acquired no jurisdiction, and his finding was null and void. The statute provides that "all or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties."

It is claimed by the appellee that the entry in the record of the consent of the parties to the reference, is a full compliance with the statute. This may be a sufficient "written consent," but the question is not before us for decision.

In the case of *Feaster v. Woodfill*, 23 Ind. 498, it was held, that where the record showed a cause to have been tried before a person other than the judge of that circuit, and no objection was made in the court below to the authority of the person so acting, the regularity of his appointment could not be questioned in this court. It would be presumed that the provisions of the statute, authorizing the appointment of a judge *pro tem.*, had been strictly followed.

The authority of the case cited is decisive of the question before us. The regularity of the submission to the referee was not questioned in the court below, upon the motion for a new trial, and we will, therefore, presume such submission to have been made "upon the written consent" of the parties.

The reason for a new trial assigned in the court below, was in these words: "because said cause was tried by a referee, and not by a jury, and the defendant never waived, nor intended to waive, his right to have said cause tried by a jury." This presents simply the question, whether the party had waived the trial by jury, and not whether the reference was made upon the written consent of the parties. We therefore decide the question of waiver alone.

The judgment is affirmed, with five per cent. damages.

 Scott v. Wallick.

J. B. Davis, W. P. Rhodes, J. H. Brown and A. A. Rice,
for appellant.

Gregory & Harper and Park & Miller, for appellee.

92 173
146 174

 SCOTT v. WALLICK.

RESCISSION.—A sold to B a shop for \$250, receiving \$100 of the price in hand, the residue to be paid on a certain day. B failed to pay the balance of the price, and A sold the shop to another person. Suit by B to recover the \$100 paid.

Held, that the second sale by A was a rescission of the sale to B, and having rescinded, A could retain no benefit derived from the contract, and was liable to refund the money paid by B.

Held, also, that if A suffered any damage by B's failure to complete his contract, he might have set up such loss as a counter-claim to the action.

APPEAL from the *Wayne* Circuit Court.

RAY, J.—Suit by *Wallick* against *Scott*, to recover \$100 paid upon the following contract:

"Cambridge City, August 1, 1864.

This is to certify that I have this day sold to *Benjamin Wallick* a meat shop that I have formerly occupied, situated in *Cambridge City*, for the sum of two hundred and fifty dollars, and have this day received one hundred dollars, and further agree to give possession of said shop six weeks from date, on receipt of the remaining one hundred and fifty dollars.

In case I fail to comply with the above, I do agree to refund the one hundred dollars paid.

JAMES A. SCOTT."

The complaint avers that after the expiration of the time stipulated for giving possession of said shop, the said *Scott* resold the same, and gave possession thereof to the purchaser.

A demurrer was filed, and an exception was taken to the action of the court in overruling it. Upon the failure of *Wallick* to pay the \$150, the appellant made another sale of the shop, and delivered possession of the same. This action on his part amounted to a rescission of the contract, and was so treated by the appellee, who thereupon demanded the return of the purchase money already paid, and, upon the refusal by appellant to pay the same, brought this action. A party can not, in a case like this, rescind the contract, and yet retain any benefit from the same. By the sale and transfer of the shop, the appellant placed it out of his power to comply with his agreement, and authorized the appellee to treat the contract as rescinded, and rendered himself liable for the repayment of the \$100. The demurrer was correctly overruled.

The appellant answered, denying that he had rescinded the contract, but averring that, at the date fixed by the contract, and for a long time afterward, and until the 15th day of *November*, he was ready and willing to deliver possession of said shop, but was unable to find the appellee; and by reason of the default of said *Wallick*, he sold the said shop for the sum of \$75, but denies that the same was in disaffirmance of the agreement. To this answer a demurrer was sustained. The action upon this demurrer was right. The attempt by the appellant, to treat the property as a pledge in his hands to secure the performance of the contract by the appellee, cannot be sustained. If it were possible to regard the contract as of that nature, still a pledge cannot be sold, except after a personal demand upon the party liable for the performance of the contract, and after public notice, for a reasonable time, of the date and place of sale, unless authorized by judicial proceeding. *Indiana & Illinois Central Railway Co. v. McKernan*; *ante*, p. 62. If the appellant suffered any damage by reason of the failure of the appellee to comply with the contract, and pay the remainder of the purchase money when due, he might have set up such damages by answer, as a counter-claim to the

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action to recover the money paid ; or he might have brought his suit to enforce the contract, at any time before he placed it out of his power to comply with its terms. But after such action as prevented his complying with his contract, he can neither sustain an action, or defense, resting upon the affirmance of the contract.

In *McCord v. The Ohio & Mississippi Railroad Co.*, 13 Ind. 220, in an action by the company to enforce a subscription of stock, it was held a good defense, that after default in the payment of the subscription, the company had issued stock to other parties to the full amount authorized by her charter, and thus placed it out of her power to comply with her contract. The same principle would prevent the appellant sustaining any defense based upon the enforcement of the contract.

The judgment is affirmed, with five per cent. damages and costs.

G. A. Johnson and L. Develin, for appellant.

W. S. Ballinger, for appellee.

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For points ruled in this case, see opinion.

APPEAL from the *Morgan* Circuit Court.

ELLIOTT, C. J.—*Lash*, the appellee, sued *Richard Perry*, *Garland Perry* and *Nathan Perry*, to recover the possession of eighty acres of land. The record shows a default against *Garland Perry*. The other defendants answered by the general denial. A jury being waived by the agreement of the parties, the issue was submitted to the court. The trial resulted in a finding for the defendants. The plaintiff moved the court for a new trial, which was overruled, and judgment given for the defendants. The plaintiff appeals.

The evidence is made part of the record by a bill of exceptions; and it is insisted that, from it, the finding should have been for the plaintiff. We do not think so. The plaintiff claims title under a sale and conveyance to him by the sheriff, on an execution issued by the clerk of the court of common pleas, on a transcript of a judgment of a justice of the peace, certified under the statute, in favor of *George Gillaspie*, against *Richard Perry* and *Garland Perry*, two of the defendants in this suit. But the evidence clearly shows that neither of the execution defendants had any title whatever to the land, or any interest therein, subject to execution, at any time after the execution of the note on which the judgment was rendered. *Richard Perry*, one of the execution defendants, was once seized in fee of the land, but he conveyed it to *Nathan Perry*, by deed in fee, on the 30th of *December*, 1850, a period of between eight and nine years prior to the date of the contract on which the judgment was rendered, under which the plaintiff claims title; and there is no evidence in the record, even tending to prove that the conveyance was not in good faith. We think the finding of the court was clearly right.

Another question urged is, that the court erred in rendering a judgment against the appellant, in favor of all the defendants, for costs; for the reason that, as *Garland Perry* suffered a default, the cause of action as to him was taken as confessed, and that the plaintiff was, therefore, entitled to a judgment against him, though he failed to recover against the other defendants. The position assumed is not a necessary result in all cases of a default against one of several defendants; and, in our opinion, is not correct as applied to the case at bar. As has been already shown, the title to the premises in controversy was in *Nathan Perry*, and not in either of the defendants in the execution, at any time after the cause of action arose upon which the judgment was rendered. But, as to *Garland Perry*, the evidence further shows, affirmatively, that he never had any title or

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interest in the land, nor was he, at any time, in the possession of it. It may be presumed that, in the mind of the plaintiff, some reason existed for making *Garland Perry* a party to the suit, but if so, it is certainly not disclosed by the evidence. The plaintiff had no cause of action against him, and having failed, on the trial, to recover against either of the other defendants, he was entitled to no judgment against *Garland Perry*. *Kincaid v. Purcell*, 1 Ind. 324, and authorities there cited; *King et al. v. The State ex rel. Hubble et al.*, 15 Ind. 64; *Perrin et al. v. Johnson et al.*, 16 Ind. 72.

It may also be observed, that as *Garland Perry* did not appear, and consequently made no costs, the judgment in his favor, if, indeed, the judgment rendered by the court is to be so considered, amounts to nothing.

The trial and finding of the court had relation only to the defendants who appeared and answered, and the judgment of the court in favor of the "defendants," for costs, is, perhaps, only a judgment in their favor. The plaintiff did not ask the court below for a judgment in his favor, against *Garland Perry* alone, and if he desired to raise any question as to that matter, he should have brought it to the attention of the circuit court, and having failed to do so, it is too late to urge it here.

The judgment is affirmed, with costs.

Harrison and Nave, for appellant.

Overstreet and Hunter, for appellees.

24	128
128	71
24	128
152	302
24	128
156	068
24	128
156	288

AMIDON and Others v. GAFF and Another.

SPECIAL FINDINGS—GENERAL VERDICT.—The special findings of the jury override the general verdict only when both cannot stand; and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issue, before the court can be called upon to give judgment against the party who has the general verdict in his favor.

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APPEAL from the *Dearborn* Common Pleas.

FRAZER, J.—Suit for goods sold and delivered. Answer, 1st. General denial. 2d. Payment. Reply, general denial. The issues were tried by a jury, who found generally for the defendants, and returned, also, findings upon special questions of fact, as follows:

“Do you believe, from the evidence, that the defendants received the goods in the complaint mentioned, and that the goods were of the value stated? Yes.

“Did *Mr. Lemon* buy the goods in the complaint mentioned for the defendants? Yes.

“Were the goods billed and shipped to, and in the name of, the defendants, by the plaintiffs, at the time of the sale and delivery thereof? Yes.

“Have the plaintiffs received pay for the goods? No.

“Was the money for the goods in the hands of *William Lemon*, to pay for the goods, at the time of the purchase thereof? No.

“Do you believe that the defendants, by their authorized agent, *Mr. Davis*, ordered *William Lemon* to purchase the goods for the defendants? Yes.

“Was *Lemon* the agent of the defendants? No.”

On the return of the verdict, the plaintiffs moved for judgment in their favor for the amount of the bill of goods sued for; on the ground that the special findings entitled them to such judgment, notwithstanding the general verdict for the defendants. This motion was overruled, and final judgment entered for the defendants.

The only question presented for our consideration arises upon the action of the court below upon the plaintiffs' motion for judgment. The evidence is not in the record, nor was there any motion for a new trial.

If the special findings can, upon any hypothesis, be reconciled with the general verdict, then the action of the court below was correct. Is such reconciliation possible? It is especially found that one *Lemon*, who was not the agent of the defendants, but who acted under the direction of *Davis*,

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who was their agent, purchased the goods for the defendants; that the defendants received them; that the plaintiffs, at the time of the sale and delivery, billed and shipped them to, and in the name of, the defendants; that the plaintiffs have not been paid for the goods; that when the purchase was made, no money was in the hands of *Lemon* with which to pay for them; and that they were of the value stated. All this may be true, and yet the plaintiffs may not have sold the goods. They "billed and shipped" them, but this they may have done as the employees of others, who actually sold them, and who are the parties to whom payment must be made. It is true that other presumptions are more probable, but an appellate court must not indulge them for the purpose of reversing the judgment of the court below. The special findings override the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be successfully called upon to direct judgment in favor of the party against whom a general verdict has been rendered by a jury upon their oath.

There is another theory which reconciles the general verdict with the special findings. If *Lemon*, in discharge of an agreement of his own with the appellees, purchased the goods on his own credit, and had them billed and shipped as found, thereby paying a debt of his own to the appellees, the arrangement being known to the appellants at the time of the sale, it must be obvious that the general verdict could only be as the jury found, and yet all the facts specially found would be also true.

The judgment is affirmed, with costs.

J. Schwartz, for appellants.

J. D. Haynes, for appellees.

Lauer v. The State.

LAUER v. THE STATE.

FOUR CASES.

QUEST.—Whether a parent can authorize another to sell liquor to his minor child, so as to shield the person selling from the penalty of the law. On the trial of an indictment for selling liquor to a minor, the evidence showed that the sales were made by a bar-tender, without the knowledge or consent of the defendant, either expressed or implied. *Held*, that the evidence did not authorize a conviction.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—Indictment for selling liquor to a person under twenty-one years of age. Plea, not guilty; verdict and judgment for the state.

Constitutional questions like those in *Hingle v. The State*, (*ante* p. 85,) decided at this term, are settled by that case.

The evidence clearly proved the sales charged in the several indictments, but that on one occasion, being the first time that the boy was furnished liquor at the defendant's saloon, and the only time that it was shown the defendant had any knowledge of it, the liquor was furnished at the request of the boy's father, who was present. The boy was sick at the time, and the father made the purchase of whisky, with pepper in it, for the boy. To this both the boy and the bar-keeper of the defendant testified. The latter testified, also, that the father told him to let the boy have what he wanted; but whether this was a general permission, or only related to that one occasion, is not clear. Subsequently the bar-keeper sold ale to the boy on as many occasions as there are indictments, and continued to do so until the father expressly forbade it. There was no proof that the defendant had any knowledge of these sales, or that he authorized them; but, on the contrary, it appeared that he had expressly instructed the bar-keeper not to sell to persons under age, and not to sell in violation of the law. It is contended that the evidence did not support the verdict.

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The case in hand furnishes us no occasion to decide upon the soundness of the broad proposition argued, that a parent may give his infant son liquor to drink without criminal liability. Whether he can authorize another to do it, and thus shield that other from liability, when the law in general terms, forbids it under penalty, is a different question; but even that is not in the present case.

But the cases must be reversed, because there was nothing in the evidence from which the inference could be drawn that the defendant either did the acts charged in the indictment, or that they were done by his authority or consent, express or implied, or even with his knowledge. We must not hold men responsible for crimes committed by others, without some proof that they either procured, counseled or advised their perpetration. We know full well, that in this class of cases the guilty may sometimes escape for a failure of this proof, and that it may sometimes be impossible to produce it in cases where it exists. But these considerations are also applicable to every other class of crimes. The guilty frequently go unpunished for lack of proof, but this is better than that the innocent shall be punished as well as the guilty. The law upon this subject is well settled. It was ruled in this state as early as 1831, in *Pennybaker v. The State*, 2 Blackf. 484, and this was confirmed in *Hipp v. The State*, 5 Blackf. 149. If there had been evidence that on other occasions the bar-keeper had sold to infants, with the defendant's knowledge, and that the latter made no objection, or still continued him in his employ, and the jury had inferred therefrom that he did so by the defendant's authority, we would not be authorized to interfere. But there was no such evidence in these cases.

The bar-keeper was asked, on cross examination, if he did not frequently go into the saloon on Sunday, and sell liquor there. The defendant's objection to this question was overruled, and he excepted. The answer was that for the purpose of reaching another room, to which access could be had only through the saloon, he did frequently go into the saloon

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on the sabbath, but did not frequently sell liquor on that day. The defendant urges that the evidence was irrelevant, and tended to create prejudice against him. The answer to the question could not, we think, have that effect, as it was in the negative. Had it been in the affirmative, and followed by evidence that the defendant knew that such was his bar-keeper's frequent practice, and permitted it, we think it would have tended to show that the instructions given him, not to sell liquor in violation of law, were not given to be obeyed, and were intended merely for use in evidence to avoid just liability. The nature of the answer given to the question put, probably furnished the reason which induced the prosecuting attorney to desist from further search in that direction.

The judgments are reversed, and the causes remanded for new trials.

J. W. Gordon, for appellant.

SANDERS v. SANDERS and Others.

VERDICT.—The verdict of a jury, when returned into court, and filed by the clerk, becomes a paper pertaining to the cause, and a part of the record, without being copied into the order book.

LOST VERDICT.—A lost verdict, like any other paper forming a part of the record, may be supplied by a proved copy.

DISMISSAL AFTER RETIREMENT OF JURY.—The plaintiff has no right to dismiss his case, to the prejudice of the defendant, at any time after the jury retires to consider of their verdict.

APPEAL from the *Monroe* Circuit Court.

GREGORY, J.—*Leroy M. Sanders* and *Frances A.*, his wife, commenced this action in the court below in *April*, 1861. They allege in their complaint, that *Wright Sanders* died seized of a farm in *Monroe* county, and a tract of land in

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Owen county, describing them; that previous to his death he made his will, whereby he bequeathed to his wife, *Polly Sanders*, during her natural lifetime, the farm in *Monroe* county, and that upon her death, the same should belong to one or the other of his sons, *David* or *Nathan*, the ownership to depend upon the condition, that whichever married first, or should undertake to farm for himself, was to have the land in *Owen* county, and the other was to reside upon the farm in *Monroe* county, and cultivate the same, and provide the said *Polly* with a comfortable support during her lifetime, and that upon her death he was to be the absolute owner thereof in fee; that *David* married first, thereby entitling himself to the land in *Owen* county, but that *David* and *Nathan*, subsequently to the death of the testator and the marriage of *David*, made an agreement whereby *David* agreed to pay *Nathan* \$500, upon the condition that *Nathan* would relinquish his right to the farm in *Monroe* county to *David*, and would take the land in *Owen* county; that, in pursuance of the agreement, *Nathan* took possession of the land in *Owen* county, and continued in possession thereof until his death, and that *David* had resided with his mother upon the home farm until his death; that *Nathan* died unmarried and childless, and left his mother and brothers and sisters as his heirs; that *David* intermarried with *Frances A.*, one of the plaintiffs, and that the fruit of the marriage was a son, *Lorenzo A.*; that *David* had departed this life, leaving as his heir, *Lorenzo A.*, who had, subsequent to the death of his father, and while he was an infant, departed this life, leaving as his only heir his mother, *Frances A.*, who had intermarried with her co-plaintiff, *Leroy M. Sanders*; that the mother, brothers and sisters of *David* and *Nathan*, claimed that the farm in *Monroe* county belonged to *Nathan*, and had upon his death descended to them; and prayed that the plaintiffs should be decreed the owners thereof, that their title should be quieted thereto, and that any cloud

that had been cast upon their title should be removed. Issues were formed upon this complaint.

Polly Sanders, the appellant, filed a cross-complaint against the plaintiff and her co-defendants, in which she alleged, in substance, that under and by virtue of the will of *Wright Sanders*, she had a life estate in the farm, and that a comfortable support was to be furnished her by whichever of the sons resided with her, and that upon her death the same should descend to the one that remained with her, upon the express condition that he should reside upon the farm, cultivate it, and provide her with a comfortable support during her lifetime; that *David* married first; that subsequently to the death of *Wright*, and the marriage of *David*, the latter and *Nathan* made an agreement, whereby *David* agreed to pay *Nathan* \$500, upon the condition that the latter would relinquish his right under the will to the farm in *Monroe* county to the former, and would take the land in *Owen* county; that *David* quit-claimed to *Nathan* his interest in the land in *Owen* county, and the latter quit-claimed to the former his interest in the farm in *Monroe* county; that *Nathan* entered into and retained the possession of the land in *Owen* county until his death; that he died unmarried and childless, and that the appellant inherited one-half of his estate, and his brothers and sisters the other moiety; that *David* did not pay *Nathan* the \$500, or any part thereof; that subsequently to the death of the latter, she, the said *Polly*, *David*, and the administrator of *Nathan's* estate, met together, and entered into an arrangement, whereby the administrator released *David* from the payment of the said sum of money to him; that *Polly* gave the administrator a receipt for \$500, as the payment to that amount of the sum that was due her as the heir of *Nathan*; that *David* agreed and promised to pay her, the said *Polly*, the \$500 so due from him to the estate of *Nathan*, which she had so paid for him; that neither *David*, previous to his death, nor his administrator since his death, had paid said sum, or any

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part thereof to her. That *David* and his wife had resided with her upon the farm until his death, but that he had failed and neglected to properly cultivate the farm, and to provide her with the kind of support that was required by the will; that after the death of *David*, *Frances A.* had wholly and absolutely failed and refused to reside with her upon the farm, and aid in the management and cultivation thereof, but had abandoned her in her old age to live alone, or to depend upon the care and attention of strangers, whom she was forced to employ; that, in consequence of such failure, she had been subjected to great expense and inconvenience. She demanded a judgment against whoever was the owner of the farm for \$500, the payment of which had been so promised by *David* as aforesaid, and for such further sum as would compensate her for the damage she had sustained, and would continue to sustain, by reason of the refusal of *Frances A.* to comply with the conditions of the will, and that whatever judgment she might recover should be a lien and charge upon the farm.

To this cross-complaint the plaintiffs answered in seven paragraphs, the first of which was the general denial; the second, third, fourth and fifth were stricken out on motion, and a demurrer was sustained to the sixth. To the seventh paragraph there was a reply, which is not, however, set out in the transcript.

The issues were, at the *April* term, 1862, submitted to a jury. The court, at the request of the parties, directed the jury to find specially on the issues, and, at the like request, the court submitted to the jury interrogatories covering the questions of fact embraced in the issues. The jury returned into court their finding, which the court directed to be recorded, but before the record was made the paper on which the verdict was written was lost.

The cause was continued from term to term, until the *November* term, 1863, when the appellant submitted a written motion, averring the loss of the verdict and diligent search therefor, setting forth a copy of the lost paper, and

asking to be allowed to prove the loss and contents thereof, and that the copy, if found true, should be recorded in place of the original, and judgment rendered thereon according to the respective rights of the parties. This motion was dismissed by the court, over the objection of the appellant. Thereupon the appellant moved the court for leave, and offered to prove by competent witnesses the existence, loss, and contents of the special finding. The court refused to entertain the motion.

The appellees then moved the court to set aside the submission which was made at the *April* term, 1862; which motion was sustained, and the submission set aside, over the objection of the appellant.

The appellees then dismissed their complaint.

The appellant then moved the court for a trial of the issues formed upon her cross-complaint; which motion the court overruled, and, over the objection of the appellant, dismissed the cross-complaint. Exceptions were taken to all of these rulings.

The appellant was a material party, and had an interest in the verdict, whether her cross-complaint is viewed as a cross-bill in chancery, or a counter-claim under the statute.

The verdict, when returned into court and filed by the clerk, became a "paper pertaining to the cause," and a part of the record, without being copied into the order book. 2 G. & H. § 559, p. 273.

A lost verdict, like any other paper forming a part of the record, may be supplied by a proved copy. See 2 G. & H., § 93, p. 113; *Lippeneott v. Wygant*, 2 Ind. 661.

Judge HITCHCOCK, in delivering the opinion of the court, in the case of *Ludlow's Heirs v. Johnson* (8 Ohio Rep. 553,) correctly says, in speaking of courts of record, that, "The proceedings, orders, judgments, decrees of such courts do not rest in parol. It is by their records they speak, and there is but one mode, as a general rule, known to the law, by which their acts can be proven, and this is by the record

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itself. True, there are cases where, after the loss or destruction of a record, you may prove its contents. In such case all has been done by the court which could be done—a record, which is the legal evidence to prove its acts, has been made. The rights of all parties concerned are fixed, and those rights ought not to be affected by time or accident. But before the contents of a record can be proved, it must be shown that it once existed, and had been lost by time or accident.”

In the case in judgment, the entry on the order book showed that the verdict had been returned into court; it was a paper under the control of the court, and the mode proposed to prove its loss and contents is unobjectionable.

The plaintiffs had no right to dismiss their case, to the prejudice of the appellant, at any time after the jury retired to consider of their verdict. 2 G. & H., § 363, p. 216.

We decide nothing further than that the finding of the jury, as offered to be proved, was material to the interests of the appellant. The question as to what relief she is entitled to under it, is not now before us, nor is it important to inquire whether her cross-complaint is a counter-claim, within the meaning of the statute.

The judgment is reversed, with costs, and the cause remanded to said court, with direction to set aside the proceedings subsequent to the motion to prove the loss and contents of the finding of the jury.

P. S. Dunning, Buskirk & Broadwell, and McDonald & Roache, for appellant.

A. G. Porter and W. P. Fishback, for appellees.

The Indianapolis & Cincinnati Railroad Company v. Kercheval.

THE INDIANAPOLIS & CINCINNATI RAILROAD COMPANY v.
KERCHEVAL.

RAILROADS—INJURY TO STOCK.—Under the law of 1863, "to provide compensation to the owners of animals killed," &c., (Acts 1863, p. 25,) all animals killed at any one time constitute a separate and indivisible cause of action, and two of these causes cannot be united to give jurisdiction to the circuit court.

SAME.—Complaint in the circuit court, in two paragraphs, for stock killed at different times. The first paragraph was for a horse worth \$200, and the second for a cow worth \$50.

Held, that as to the second paragraph of the complaint the circuit court had no jurisdiction, as the value of the cow did not exceed \$50.

APPEAL from the *Decatur* Common Pleas.

RAY, J.—A complaint in two paragraphs was filed against the appellant. The cause of action stated in the first paragraph, was the killing, on the 24th day of *May*, 1864, by appellants' cars, of a mare, and the injuring of a colt. It was averred that the railroad was not securely fenced. The damages claimed were \$200.

The second paragraph alleges the killing, in *July*, 1863, of a cow belonging to appellee, of the value of \$50.

A demurrer, for want of jurisdiction of the cause of action, was filed to the second paragraph. The demurrer was overruled. Upon the trial, the witnesses fixed the value of the mare at \$125, and no injury was shown to have resulted to the colt, and the appellee waived all claim for damages for any such injury. The value of the cow was fixed at from \$12 to \$15. The appellant objected to the evidence offered to support the second paragraph of the complaint. The objection was overruled, and exception taken. A motion for a new trial was also overruled, and a judgment was rendered for \$137. The law of 1863, "to provide compensation to the owners of animals killed," &c., contains the same provisions, in regard to the jurisdiction of the circuit and common pleas courts, that were to be found in the act of 1859, and under the latter act it was held, in the case of *The Indianapolis & Cincinnati Railroad Company v. Elliott*, 20 Ind.

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430, that the animals killed at any one time constituted a separate and indivisible cause of action, and these causes could not be united to give jurisdiction to the Circuit Court.

Under this decision, each case must be tried by the court having jurisdiction of that particular cause of action, and as the value of the cow did not exceed \$50, the jurisdiction was limited under the statute to a justice of the peace. The demurrer should have been sustained to the second paragraph of the complaint, and the evidence in support of its averments excluded.

The cause is reversed, with costs, and remanded for further proceedings.

T. A. Hendricks and *O. B. Hord*, for appellant.

S. Bryan, for appellee.

HIBBS and Others v. THE STATE.

SEPARATE TRIAL.—In trials for misdemeanors upon information, an application for a separate trial is addressed to the discretion of the judge before whom the cause is heard.

APPEAL from the *Fayette* Common Pleas.

RAY, J.—Appellants were charged, upon an information, with riot. The first error assigned is, that the court refused to grant the motion for a separate trial.

There was no error in this. In trials for misdemeanors, upon information, the application for a separate trial is addressed to the discretion of the judge before whom the cause is heard. There is no law requiring that the application should be granted, and we decline to consider arguments based upon the ideas of counsel as to what the law should be. Such arguments may be pertinent when addressed to the law making power.

What the law is, was decided in the case of *Lawrence v. The State*, 10 Ind. 453, and we are unable to discover upon

what ground it can be insisted that there is an admission in the earlier case in the same volume, of *McJunkins v. The State*, that the right to such separate trial exists. Indeed, the opinion implies a denial of the right, holding that the application came too late, "even if the statute gives the right when properly claimed, to persons prosecuted by information." The argument that we are to reconsider these decisions, because the legislature has, since they were rendered, conferred jurisdiction upon the common pleas court in certain contingencies to try felonies, is addressed to a court unable to appreciate its force, if force there be in it, and we, therefore, adhere to the former rulings.

The appellants also excepted to the refusal of the following instructions asked by them:

"There must be three or more persons engaged assisting one another, and if a person at some distance when the riot is done, comes up immediately afterward, and does violence on the same object, he is not guilty of a riot.

"If the jury are satisfied from the evidence, that *Thomas Hibbs*, one of the defendants named in the information, was not present during the time of the commission of the fight between *Caldwell Hibbs* and *Richard Williams*, the prosecuting witness, and until they were separated, he would not be liable under the information for a riot, even although he may have made a great noise in swearing, or otherwise, and offered to fight *William Lucas*, another person in the same crowd."

A person at "some distance" may have been engaged in assisting and encouraging those actively engaged in the riot, and if it is intended to hold him discharged because he "immediately" came up and committed the same acts of violence, we cannot regard the instruction as improperly refused. Nor is the meaning of the word "present" very clearly conveyed to the jury, when they are told that a person may not be present, and yet "have made a great noise by swearing, and offering to fight *William Lucas*, another person in the same crowd."

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The law, as doubtless intended to be expressed in the instructions asked by appellants, was very clearly, and at considerable length, given to the jury in the instructions of the court, and we do not feel it to be proper to extend this opinion, or to burden the reports, by their quotation.

The judgment is affirmed.

J. S. Reid, for appellants.

N. Trusler, B. F. Claypool and D. E. Williamson, Attorney General, for the State.

STEWART v. THE STATE.

24	142
142	684
24	142
157	362
157	615

ATTORNEY GENERAL.—The Attorney General, alone, is authorized by law to prosecute and defend criminal or state prosecutions in the Supreme Court. Page 144.

BILL OF EXCEPTIONS IN CRIMINAL CASES.—In criminal prosecutions, the bill of exceptions must be made out and presented to the judge at the time of the trial, or within such time as the court may allow, *during the term*. Page 144.

SAME.—The legal presumption is that the judge signed the bill of exceptions when presented, and that it was filed by the clerk when signed.

INDICTMENT.—An indictment becomes a part of the record when filed, without any further action of the court.

GRAND JURY.—The consultations of the grand jury are, by law, secret, and it is not competent to inquire into the amount of evidence on which they acted.

SAME—INSTRUCTIONS TO.—It is the duty of the court to instruct the grand jury, but a failure to do so does not affect the validity of their presentments.

APPEAL from the *Cass* Circuit Court.

GREGORY, J.—*Stewart* was indicted at the *October* term, 1863, of the *Cass* Circuit Court. The indictment contained two counts, the first of which was, on motion of defendant, quashed. The second count charges that *James F. Stewart*, on, &c., at, &c., did then and there unlawfully, falsely and feloniously utter and publish, as true and genuine, four false, forged and counterfeit promissory notes, for the payment of

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money, * * * * * (the notes are set out).
 * * * * * And that the said *James F. Stewart* did, then and there, unlawfully, falsely and feloniously utter and publish, as true and genuine, said four false, forged and counterfeit promissory notes to one *William Kafferty*, then and there knowing the same to be false, forged and counterfeit, with the felonious intent, then and there, to defraud him, the said *William Kafferty*. A motion to quash was overruled, and defendant excepted. He then pleaded in abatement, that on, &c., being the first judicial day of the *October* term, 1863, of the *Cass* Circuit Court of the State of *Indiana*, only twelve men were on that day empaneled, charged and sworn as grand jurors in and for said court, at its said *October* term; that afterward, at said term, on, &c., the court discharged one of said grand jurors; that afterward, on, &c., the remaining eleven came into open court, bringing with them the indictment in this case, when the court directed another man to be placed on said grand jury; whereupon one *James Horney*, a bystander, was placed on said grand jury, after having the oath prescribed by the statute administered to him by the clerk, and was not charged by the court as to his duty as a grand juror. The grand jury never, after said *Horney* was thus placed on said jury, were charged by the court, to discharge their duties; that but one charge was ever administered to them as a body composed of twelve men. He further says that after said *Horney* was thus added to the eleven remaining grand jurors, they, with him, retired to their room, and immediately returned the indictment in this case in open court, without any testimony whatever being heard by them after said *Horney* was thus attempted to be placed on said jury.

A demurrer was sustained to this plea in abatement; and the defendant excepted.

Plea, not guilty; trial by a jury; verdict, guilty. Motions for a new trial, and in arrest, were overruled, and judgment.

On overruling the motion for a new trial, on the sixteenth judicial day of the term, (the term being three weeks,) the

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court gave the defendant sixty days in which to file a bill of exceptions. Within that time, but after the expiration of the term, it was filed, presenting the questions arising on the motion for a new trial. And we are asked by the *Attorney General* to disregard the questions thus presented, as not forming any part of the record. *D. H. Chase, Esq.*, the prosecuting attorney for the 11th circuit, in which is the county of Cass, on the 23d of May, 1865, signed an agreement waiving all objection to the time of its filing.

The *Attorney General* is, alone, authorized by law to prosecute and defend criminal or state prosecutions in this court. (Laws passed at the extra session of 1861, § 1, p. 14, last clause.)

The code, "concerning the civil procedure of courts and their jurisdiction in civil matters," provides that "the party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, *unless by special leave of the court.*" 2 G. & H., § 843, p. 209.

The code "concerning the mode of proceeding in criminal cases," enacts that "all bills of exception in a criminal prosecution must be made out and presented to the judge at the time of the trial, or within such time thereafter, *during the term*, as the court may allow, signed by the judge and filed by the clerk. The exception must be taken at the time of the decision." 2 G. & H., § 120, p. 420.

This language is plain, and admits of but one interpretation. In criminal prosecutions, the bill of exceptions must be made out and presented to the judge at the time of the trial, or within such time as the court may allow, *during the term*.

The legal presumption is that the judge signed the bill of exceptions when presented, and that it was filed by the clerk when signed.

This, of course, will not prevent the compelling a judge to sign the bill of exceptions, after the term, when it has been

properly presented to him, at the time of the trial, or within such time *during the term* as he may have fixed by order of the court.

It follows, that the bill of exception in the case at bar, although copied into the transcript, forms no part of the record, and cannot be considered by us.

It is objected to the indictment that it is not made a part of the record by any action of the court below.

The transcript shows that the indictment was returned into court by the grand jury. An indictment becomes a part of the record when filed, without any further action of the court.

It is urged that the indictment does not contain all the requisites required at the common law. No particular defect is pointed out by counsel. The indictment is good by the statutory rules of pleading in criminal cases. See the case of *Reams v. The State*, 23 Ind. 111.

It is contended that the court below erred in sustaining the demurrer to the defendant's plea in abatement. Two sections of our statute are referred to; which are as follows:

§ 1. "That a grand jury shall consist of twelve members, all of whom shall be reputable freeholders or householders of the proper county, and taxable therein." 2 G. & H., pp. 431, 432.

§ 16. "Each juror must take the usual oath. The court must plainly instruct them as to their duty. An indictment may be found by any nine. It must be indorsed by the foreman, 'A true bill.—A. B., foreman,' returned into court, and filed by the clerk." 2 G. & H., p. 394.

When the indictment was returned into court, the grand jury consisted of twelve men. By law, their consultations are secret; and it is not competent to inquire into the amount of evidence on which they acted. It was the duty of the court below to instruct them; but the omission to do so does not affect the validity of their presentments or indictments. The court committed no error in sustaining the demurrer.

Little v. Thompson and Others.

The judgment is affirmed, with costs.

L. Chamberlain, for appellant.

D. E. Williamson, Attorney General, for the State.

LITTLE v. THOMPSON and Others.

PRACTICE—AMICUS CURIAE.—On the filing of the report of the viewers before the commissioners, in a proceeding for the location of a highway, A appeared as a friend of the court, and asked to file the dismissal of one of the petitioners, and to show by affidavit that another of the petitioners was not a resident of the county.

Held, that as A was not a party to the record he had no right to be heard in the case at that time. Page 147.

ROADS—PETITIONS FOR.—JURISDICTION OF BOARD.—On the trial, in the circuit court, of an application for the location of a highway, the defendant filed the affidavit of one of the petitioners that he was not a resident of the county at the time of signing, &c., and moved the court to dismiss the cause, on the ground that twelve resident freeholders of the county had not signed the petition.

Held, that as the objection did not appear on the face of the petition, it should have been presented by plea in abatement, and not by motion; and even if raised by plea it would have been too late, under sec. 54, 2 G. & H. 81. Page 148.

Held, also, that before a county board can take jurisdiction of an application for the location of a highway, it must appear, 1st, that notice of the application has been given; 2d, that twelve freeholders of the county have signed the petition; and 3d, that six of the petitioners are of the immediate neighborhood of the road. Page 149.

Held, also, that any one interested may appear and contest any of these jurisdictional facts, but the finding and judgment of the board upon these points, when entered of record, is conclusive in such case. Page 150.

Held, also, that the dismissal of the petition, by one of the twelve petitioners, will not oust the jurisdiction after it has once attached. Page 151.

APPEAL from the *Hamilton* Circuit Court.

ELLIOTT, C. J.—*Thompson* and others, to the number of twelve, filed a petition before the Board of Commissioners of *Hamilton* County, praying for the location and establishment of a public highway in said county; and the record states that "the board, after examination of the matter, being

24	146
125	334
24	146
129	341
24	146
148	147
24	146
158	342
24	146
160	659
160	660
24	146
171	14
171	15
171	722

satisfied that the requirements of the statute in such case made and provided have been complied with by the petitioners, in all matters relating to the petition herein," appointed viewers to view the proposed highway, and report as to its public utility at the next session of the board. At the succeeding term of the board, two of the viewers appointed reported in favor of the proposed highway. *O'Brien* then "appeared as the friend of the court," and filed a written dismissal of one of the petitioners, and also offered to file an affidavit that *James Carson*, another of the petitioners, was not a resident of *Hamilton* county, &c., and that the names of *John* and *Benjamin Devaney* were on that day placed on the petition. The court refused to entertain the motion, and rightly. *O'Brien* was not a party to the record, and had no right to be heard in the case at that time.

John Little, a resident, through whose land the proposed highway passed, then appeared and filed his remonstrance against it. The reasons assigned are: 1st, the proposed highway is not of public utility; 2d, that a part of it is already a public highway; 3d, because there is another road within one-fourth of a mile of the one proposed.

The board thereupon appointed three reviewers to review it, and the matter was continued. At a subsequent session of the board, *Amos Pettyjohn*, one of the petitioners, filed, as to himself, a dismissal of the petition, and then *O'Brien* again moved to dismiss, because there were not twelve free holders of the county parties to the petition. The board overruled the motion, and, we think, correctly, because the names of twelve persons remained on the petition, who, from the statements in the record, we must presume were resident freeholders of the county.

The persons appointed to review the proposed highway, afterward reported in favor of it, as one of public utility.

Little then filed a claim for damages, and the board appointed viewers to assess and report the same, if any, to the board.

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The last named viewers reported that the proposed highway was of public utility, and that the said *Little* would sustain no damage thereby. The board thereupon ordered a record of said highway to be made, and that the same should be opened and kept in repair.

Little appealed to the circuit court, where the case was tried by a jury, who found that the highway proposed was of public utility, and against *Little's* claim for damages. Motion for a new trial overruled, and judgment, on the finding of the jury, that the road is of public utility, and against *Little* for costs.

Little appeals to this court. Before the trial of the cause in the circuit court, he filed the affidavit of *James Carson*, one of the petitioners, stating that he was not, at the time of signing said petition, nor at the time the same was presented to the board of commissioners, a resident of *Hamilton* county, and thereupon moved the court to dismiss the cause, on the ground that there were not twelve resident freeholders of the county joining in the petition, at the time it was presented to the board of commissioners. The circuit court overruled the motion, and that ruling is now urged as a cause for reversing the case.

We do not think the court erred in overruling the motion. The objection goes to the capacity of one of the petitioners to join in the petition; and, as the objection did not appear on the petition, if it could have been presented at any time after the appointment of the first viewers, it should have been raised by a plea in abatement, and not by motion. But even if raised by such plea in the circuit court, it would have been too late. The statute provides that if the objection be not taken "either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action," &c., 2 G. & H., § 54, p. 81. The provision is found in the civil code, but is applicable to trials before the board of commissioners. The ninth section of the "act providing for the organiza-

tion of county boards," &c., 1 G. & H. 249, provides that, "Such commissioners shall adopt regulations for the transaction of business, and in the trial of causes they shall comply, so far as practicable with the rules of conducting business in the Circuit Court," *Little* appeared in the commissioner's court, and made no objection to the capacity of the petitioners to file the petition, but answered to the merits of the petition by remonstrance, denying that the proposed highway was of public utility. *John H., Thomas and Benjamin Devaney*, three of the petitioners, appeared and filed in the Circuit Court a written dismissal of the cause as to themselves. Upon which *Little* again moved the court to dismiss the petition, which motion the court overruled. He then filed an answer in abatement, stating all the facts upon which the several motions to dismiss were founded, and verified it by an affidavit. The court sustained a demurrer to the answer, which is assigned as error. By the averments in the answer, it is shown that by the dismissals filed by a part of the petitioners, the number remaining was reduced below twelve, and it is therefore argued by the appellant's counsel, that the dismissal by a part of the petitioners ousted the Circuit Court of jurisdiction of the cause, and that the court erred in not sustaining the plea in abatement. The question presented is not free from doubt. It arises in a case belonging to a class in which the rules of practice are not well defined by statute, and seems to present a proper occasion for us to indicate what we regard as a proper rule of practice in such cases, in the hope that it may assist in furnishing a guide which will relieve the subject of some difficulty.

The facts necessary to give the commissioners jurisdiction in the matter were: 1st, that the requisite notice of the petition had been given; 2d, that the petition was signed by twelve freeholders of the county; 3d, that six of the petitioners were of the immediate neighborhood of the proposed highway.

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The board had authority to do nothing until these facts were shown to exist. As to the notice, the statute certainly so provides, and as to the other jurisdictional facts, it may not be an unfair construction to hold that it requires them also to be shown, before any step can be taken toward granting the prayer of the petition. The facts are required to exist to give the commissioners jurisdiction. They cannot appoint viewers without entertaining such jurisdiction, and inasmuch as no adversary party is made in the petition, or provided for by the statute, whose duty it is to appear at the time it is filed, it would seem but reasonable that the commissioners should require of the petitioner proof of the facts necessary to give jurisdiction. The requirement of the statute, that notice of the petition should be given, it seems to us, implies that any freeholder of the county, or perhaps any person who may be interested in the subject matter, may appear at the time the petition is presented, and contest any of such jurisdictional facts; otherwise there would seem to be no object in requiring such notice. The time for this inquiry, then, precedes the appointment of viewers. It cannot be made afterward, and it must be made at that time, whether any one appears to raise the objection or not. If any one should appear at the time the petition is presented, and raise the objection, we think he might do so, and produce evidence touching the question of jurisdiction, without a plea in abatement. If the objection is not made at that time, the finding and judgment of the board upon that subject, entered of record, is in such a case conclusive upon it.

It is not doubted but that any petitioner may withdraw, at any time before the question of jurisdiction has been passed upon by the board. Twelve in all, six of whom must be of the neighborhood, must ask for the road, in order to put the proceedings in motion; but there would be great unfairness in permitting one of the twelve afterward to dismiss the case, and involve his fellow petitioners in costs, without their consent. It seems reasonable, how-

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ever, that he should at any time be permitted to relieve himself from future liability, without injury to others, by dismissing the petition as to himself alone. This he may do, but it will not result in defeating the jurisdiction, after it has once attached. Here, the appellant appeared before the board, at the time the first viewers filed their report in favor of the road, and, under the statute, made himself a party by remonstrating against the public utility of the proposed highway, and by subsequently claiming damages. These questions formed the issues presented by him. He was defeated before the commissioners, and appealed the case to the circuit court, where the same issues were again presented for trial, and we think that he cannot complain that the jurisdiction of the court was not defeated by the dismissal of the petition by a part of the petitioners, as to themselves alone.

It is also objected that the finding of the jury is contrary to the evidence.

The evidence is in the record. A large number of witnesses were examined, and their statements and opinions are very conflicting, both as to the public utility of the proposed highway, and on the question of damages. We cannot say that the evidence does not justify the finding, and, therefore, cannot disturb the judgment on that account.

The judgment is affirmed, with costs.

J. O'Brien, for appellant.

D. Moss, for appellees.

CREEK v. THE STATE.

24	151
137	241
24	151
147	134
24	151
157	615

MURDER—SELF-DEFENSE.—On the trial of an indictment for murder in the second degree, the court instructed the jury that no "threatening actions" of the deceased could justify the defendant in taking his life, and, in another instruction, told them that if the deceased made a violent assault upon the defendant while he was retreating, and the deceased

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pursued him, and the defendant had reasonable apprehension of great bodily harm, and had used all reasonable means to keep out of the way, he would be justified in repelling the assault, and if, in so doing, death resulted, he ought to be acquitted.

Held, that neither instruction correctly stated the law. The latter was erroneous, because retreat is not always a condition which must precede the exercise of the right of self-defense. Page 158.

MANSLAUGHTER.—In manslaughter, the killing, if upon a sudden heat, must be voluntarily done, and without malice. Page 158.

SELF-DEFENSE.—**FEAR OF BODILY HARM.**—To justify the killing of another on the ground of fear of great bodily harm, there must be reasonable cause for such fear, and it is not sufficient to show that the defendant was in actual fear. Page 154.

CRIMINAL LAW.—The criminal law, while indulging to a humane extent the mere infirmities of human nature, nevertheless requires of sane men the exercise of a mastery over their fears, as well as their passions.

NEW TRIAL.—**SEPARATION OF JURY WITHOUT LEAVE.**—*Seemle*, that if after the jury have retired to deliberate on their verdict, some of them separate from their fellows, without the leave of the court, and without being attended by an officer, a new trial will not be granted, (unless our statute makes it imperative,) if the verdict is clearly right upon the evidence; but if the correctness of the verdict be doubtful, a new trial must be granted. But in all such cases, the misconduct being established, the burden is upon the prosecution to show that the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties. Page 155.

QUIERE.—Whether the statute (2 G. & H., sec. 142, p. 422,) does not make it imperative on the court to grant a new trial for such cause. Page 155.

GRAND JURY.—**INDICTMENT.**—To an indictment the defendant pleaded, 1st, that it had been found by the grand jury without evidence; and 2d, that no vote was taken by the grand jury.

Held, that the pleas were correctly rejected.

Held, also, that the return of a bill into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding, which cannot be controverted by plea. Page 156.

APPEAL from the *Fayette* Circuit Court.

FRAZER, J.—This was an indictment for murder in the second degree. There was a conviction for manslaughter.

The court instructed the jury that no "threatening actions" of the deceased could justify the defendant in taking his life. In a separate charge, the court also told the jury, that if the deceased made a violent assault upon the defendant, while he was retreating, and the deceased was pursuing him, and the defendant had reasonable

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apprehensions of great bodily harm, and had used all reasonable means to keep out of the way, he would be justifiable in repelling the assault, and if, in so doing, the death of the deceased was produced, the defendant ought to be acquitted.

It is not possible to reconcile these two instructions. In one, the jury was, in effect, told that no threatening actions could have warranted the defendant in taking the life of the deceased; while in the other, they were told that certain menaces would warrant it, provided the defendant had been retreating, and the deceased pursuing him. Even the latter does not give the law accurately. Retreat may be impossible or perilous, and is not, therefore, always a condition which must precede the right of self-defense. The law upon the subject is so accurately laid down in the text books, that it seems to us unnecessary to discuss it further. The first instruction to which we have alluded was given on motion of the prosecuting attorney. It is so very much at variance with all that is settled upon the subject, that we need not prolong this opinion by dwelling upon it.

In the fourth instruction, given by the court upon its own motion, after setting forth an accurate definition of manslaughter, as the statute defines it, it is added, "and if the defendant killed the deceased upon a sudden heat, with an ax, as charged in the indictment, you can find the defendant guilty of manslaughter." This is inaccurate. The killing must have been *voluntarily* done, upon a sudden heat, if without malice, to make it manslaughter.

The defendant moved the court to give sundry instructions to the jury, which were refused; by which the question is raised, whether the actual *fear*, by the defendant, of great bodily harm from the deceased, would be sufficient to excuse the homicide, or whether there must be *reasonable cause* for such fear.

This question is one concerning which much may be said on both sides that is plausible and difficult to answer. It

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has been somewhat discussed by judicial tribunals, from time to time, as they have been compelled to pass upon it; and it seems to us that much that has been said upon it is more metaphysical than practical, and that often the theory of existing law has been lost sight of, in the nicety of abstract disquisition. We are not disposed to enter at much length into the subject.

It ought to be borne in mind, that the criminal law holds sane men responsible for the ordinary exercise of their reason. It is a power common alike to cowards and those who know no fear. It is a guide to which both may apply, if they wish to do so. By the power of will, he who is naturally very timid can, and often does, meet danger with as much self-possession as the boldest man, and even his fears beget that caution which is a necessary safeguard against rashness. Of all men, he is probably least likely to commit needless homicide in self-defense, for his unfortunate weakness usually tends to paralyze his arm, and makes him slow to strike, quite as much as it subjects him to the torture of groundless apprehension. Of course, we speak of persons not so unmanned by fear as to be incapable of exercising either judgment or will. A sane man is so constituted that he can be either the master or the slave of his fears, as well as his passions. The criminal law, indulging to a humane extent the mere infirmities of human nature, nevertheless requires the exercise of this mastery. Accordingly the great weight of authority is against the doctrine urged by the appellant's counsel. We believe it has met the approval of the Supreme Court of Tennessee only. *Shorter v. The People*, 2 Coms. 197; *Stewart v. The State*, 1 Ohio (McCook) 71.

While the jury was deliberating, some of its members, without the leave of the court, or the knowledge or consent of the defendant, and without being attended by an officer, separated from their fellows, went where there were other persons, and drank whisky. It was shown by affidavits that they did not drink to intoxication; that the influence

of liquor was not perceptible upon them, and that during such absence they were subjected to no influences whatever by others, and in no respect attempted to be tampered with.

Does this constitute, of itself, sufficient cause for a new trial? The sum of the modern authorities is, that such conduct on the part of jurors is exceedingly reprehensible, and ought to be visited with punishment by the court below; but that where the verdict appears clearly to be right upon the evidence, a new trial will not be granted, but if the correctness of the verdict be doubtful, then such misconduct will result in a new trial. But in all such cases, the misconduct being established, it will impose upon the prosecution the necessity of removing suspicion, by showing, as was done in this case, that the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties. These doctrines seem to us sound and wise, and in the present case, the evidence not being in the record, we could not, for this cause, unless our statute changes the law, reverse the judgment. *The People v. Ransom*, 7 Wend. 423; *Smith v. Thompson*, 1 Cow. 221; *Burrill v. Phillips*, 1 Gall. 360; *The People v. Douglass*, 4 Cow. 26; *Com. v. Roby*, 12 Pick. 496; *Wilson v. Abrahams*, 1 Hill 207; *U. S. v. Gibert*, 2 Sumn. 21; *Rowe v. The State*, 11 Humph. 491; *Thompson's Case*, 8 Grat. 637.

But it is urged that our statute (2 G. & H., § 142, p. 423,) made it imperative on the court below to grant a new trial; the word "may," in the statute, being the equivalent of "must." I am not now prepared to rule against this proposition. Upon this subject, however, we are not all now agreed, and as we are not compelled to pass upon the question in the present case, we do not decide it.

At the proper time, three pleas in abatement were filed: 1st, that the indictment was found by the grand jury without evidence; 2d, that no vote was taken by the grand jury. The third was an embodiment of the first and second. These pleas were set aside by the court. This was right.

 Wilson v. Ray.

Cases are easily imagined where it would be but senseless form to examine witnesses before the grand jury. If for some defect, an indictment for the same offense, returned at that term of the court, had been quashed, it would be strange if the witnesses must be re-examined, before the same grand jury could return another bill. *Stewart v. The State*, ante, p. 142. The return of the bill into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding, which cannot be controverted by plea.

The judgment is reversed, and the cause remanded for a new trial; defendant to be returned, &c.

B. F. Claypool, J. M. Wilson and J. F. Gardner, for appellant.

N. Trusler, J. S. Reid and J. Yaryan, for the State.

 WILSON v. RAY.

PLEADING—FORMER RECOVERY.—A judgment on a demurrer to a good answer, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action. Page 158.

SAME.—That new matter is introduced in the second suit does not prevent the former recovery from operating as a bar, to the extent of the points involved in the former case. Page 159.

APPEAL from the Marion Circuit Court.

GREGORY, J.—Suit by *Wilson* against *Ray*. The complaint avers that, on the 1st of June, 1852, the former and one *Vance* were engaged in the performance of a contract with "*The Indianapolis & Cincinnati Railroad Company*," in furnishing the material and labor in the construction of a portion of her road; that *Vance* and the appellant were to receive for the labor and materials furnished the bonds of the company, at seventy-five cents on the dollar; that they complied with their contract, and received from the company in compensation therefor \$350,000 of bonds, one half of

which was the property of the plaintiff; that the company, under the contract, had the right to redeem the bonds within twelve months from the 1st of August, 1852, by paying *Vance* and *Wilson* eighty-five cents to the dollar, in the city of *New York*; that about the time *Vance* and the plaintiff were engaged in performing their part of said contract, the latter and *Ray* entered into a *co-partnership* in the business of procuring the bonds from the company, and in their negotiation and sale; that by the terms of the *co-partnership* the defendant was to indorse for the plaintiff, and negotiate and procure for him loans of money to enable him to perform his part of the contract, and to procure said bonds; that the bonds, when so procured, were to be held upon account of the joint interests of the plaintiff and defendant; that the same were to be sold on joint account, and after paying the plaintiff *seventy-five* cents upon the dollar of the bonds so sold, the excess for which the bonds might be sold was to be divided equally between the plaintiff and defendant, but that if the bonds should sell for less than *seventy-five* cents to the dollar, then the difference between *seventy-five* cents and the sale price should be divided as a loss between them; that the defendant performed his part of the contract by indorsing and procuring loans for the plaintiff; that after the contract with the railroad company had been performed, and the bonds procured, the share of the plaintiff was placed in the hands of the defendant for sale, and that the latter sold \$175,000 thereof, at the price of *twenty cents* to the dollar, whereby a loss was sustained by the parties of \$60,000, which was suffered and paid by the plaintiff, and that the same remains unsettled and unpaid; that the partnership remains unsettled and unadjusted, notwithstanding the plaintiff has often requested the defendant to settle and adjust the same; and that he has never accounted to the plaintiff for such sale, or adjusted the losses which had accrued, growing out of the partnership.

To this complaint the defendant answered, among other things, as follows, viz: "The defendant further answering,

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says, *as to so much of the complaint as seeks to charge the defendant with the loss on bonds mentioned therein, upon the sale thereof, that heretofore, to-wit, at the October term, 1856, of the Marion Circuit Court, the plaintiff impleaded the defendant in a certain civil cause then in the same court pending, upon the same cause of action mentioned in the introductory part of this paragraph, and such proceedings were thereupon, then and there, had, in said court, that afterward, at the same term, it was, in said cause, considered by said court, that said plaintiff should take nothing by his suit, and that the defendant should recover his costs and charges by him about his defense in that behalf laid out and expended; all which by the record of that cause in said court remaining at large appears, a copy of which record is herewith filed, marked 'A.'* And the defendant avers that said judgment was rendered on the same supposed cause of action mentioned in the introductory part of this paragraph, *and as to the residue of said complaint, the defendant denies the same.*"

The record made and exhibited, so far as the same is material in the consideration of the case in judgment, will be found stated in the case of *Wilson v. Ray*, 13 Ind. 1, in this court, at its *May* term, 1859.

The final judgment in that case was on a demurrer to an answer, setting up the statute of frauds.

In the case at bar, there was a demurrer overruled to the paragraph of the answer above set forth, and the plaintiff replied by a general denial. By agreement of the parties, the issues thus formed were submitted to the court; finding for the defendant; motion for a new trial overruled.

The evidence is in the record, and consists of the record of the prior suit, and the testimony of *Ray*, the defendant, who says that the matters embraced in the said record are the same as the matters in this suit, and that he had no other transactions with the plaintiff, out of which this suit could originate, except the matters and things embraced in the former suit.

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It is claimed by the counsel for the appellant that the court below erred in overruling the demurrer to the foregoing paragraph of the answer, and in finding for the defendant on the trial of the issues thereon.

We are very clear that the former judgment is a bar to so much of the complaint at least *as seeks merely to charge the defendant with loss on the bonds*, and the residue of the complaint was *denied*, and it was for the plaintiff, and not the defendant, to show the truth of the allegations beyond the claim for such loss.

The issues were fully sustained on the part of the defendant, and the plaintiff offered no evidence.

It is contended that the plaintiff misconceived his cause of action in the former suit, and was beaten for his blunder; and that the judgment on demurrer is no bar to the subsequent proceedings now in judgment, and we are referred to the case of *Stevens v. Dunbar*, 1 Blackf. 56, in this court.

In that cause, the judgment relied on as a bar was rendered in favor of the defendant upon a demurrer to the *declaration*. In such a case, in the nature of things, the judgment could not be a bar to a subsequent suit, founded on a *good* complaint, for therein would be the difference between the former and latter action. But a judgment on a demurrer to a good defense, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action, for the plaintiff, by his demurrer, admits of record the truth of the answer. *Mr. Chitty* says: "If the plaintiff demur to the plea in bar upon the merits, and such plea be sufficient, in that case also no second action can be commenced." 1 *Chitty's Pleadings*, 198.

The question of *the loss on the bonds* was directly involved in the prior action, and that there is new matter introduced into the present suit, denied by the answer, does not prevent the bar, to the extent of the points involved in the former case, unless the new matter was proved on the trial. *Doty v. Brown*, 4 Comstock, 71; *White v. Coatsworth*, 2 Selden, 187; *Castle v. Noyes*, 4 Kernan, 329.

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It is by no means clear, however, that the complaint in the former action did not charge a partnership; the agreement was one to share in *profit and loss*. The point was not ruled by this court in the former case. Mr. Justice WORDEN, in delivering the opinion, says: "Admitting that the contract amounted to one of partnership between the parties, (a point which we by no means decide,) still it is not perceived why that should take the case out of the statute. The language of the statute covers contracts of partnership as well as any other, and if they are not to be performed within a year, we think no action can be maintained upon them unless they are in writing."

The learned counsel for the plaintiff, in their brief in that case, say: "Will it be said that there was no partnership, because there was no joint interest in the property, but only in the profits and loss? We answer in the language of *Chitty*, 'that the right to participate in profits, and the liability to contribute to losses, create a partnership, however unequal the shares may be, and although one party has no direct interest in the capital of the firm.' *Chitty on Cont.*, 213."

Mr. STORY, in his work on Contracts, states the rule thus: "§ 208. Wherever there is both a community of interest in the capital stock, and in the net profits, the contract of partnership is created so as to bind the partners. It is not, however, necessary that both of these circumstances should concur, in order to constitute a partnership; for even if the whole capital stock be the exclusive property of one of the parties, yet if there be a community of *profit and loss*, the parties will be partners."

But, without intending to decide whether the facts charged in the former complaint constituted the plaintiff and defendant partners, as between themselves, it is clear that the plaintiff under such facts had the right to compel the defendant to account for the loss. *Per Vice Chancellor in Atwater v. Fowler*, 1 Edwards Ch. Rep. 417. It is not clear that the complaint in the case at bar charges a community of interest

Newby v. Warren.

in the bonds in the plaintiff and defendant. Taking all the allegations together, it might fairly be inferred that the bonds were placed in the hands of *Ray* only for their sale, as the agent of *Wilson*; but however this may be, it in no way affects the question ruled in this opinion.

The judgment is affirmed, with costs.

RAY, J., was absent.

J. L. Ketcham, McDonald & Roache, for appellant.

J. Morrison, T. A. Hendricks and O. B. Hord, for appellee.

NEWBY v. WARREN.

INSTRUCTIONS—EXCEPTIONS TO.—Exceptions to instructions given, or refused, by the court, may be taken either by the attorney writing at the close of each, "given (or refused) and excepted to," and signing it, or by a general bill of exceptions, and when neither of these methods are resorted to, the instructions make no part of the record, and will not be noticed.

SAME.—When the words "given (or refused) and excepted to" are written after the instruction, and signed by the judge, instead of the attorney, the exception is not properly reserved.

APPEAL from the *Wayne* Common Pleas.

FRAZER, J.—There are two methods by which instructions given by the court to a jury may be preserved in the record. One of these methods is provided by statute, 2 G. & H., 199, *et seq.*, and is so plainly stated therein that no interpretation is needed. The other method is by bill of exceptions. In the case before us, both of these methods were overlooked. The clerk has, however, copied into the transcript certain papers, which, he states, are the instructions given and refused. It does not appear that the court was requested to instruct in writing, and the general instructions which thus purport to have been given by the court, are not signed by the judge. They are, therefore, no part of the record, and ought not to be found in the transcript. Special instructions asked by the appellant, if refused, might, with his excep-

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tions, have been made part of the record without a bill of exceptions, if his counsel had written at the close of each "refused and excepted to," and signed the name of the *counsel*. In this case the exception thus written is signed by the judge instead. It follows that they, too, are improperly here. We cannot regard papers which are in the transcript improperly, and consequently we cannot pass upon the questions made upon the instructions, and urged upon our attention on behalf of the appellant; and as no other question is presented, the judgment must be affirmed.

The judgment is affirmed, with costs.

W. S. Ballenger and N. H. Johnson, for appellant.

INDIANAPOLIS, PITTSBURGH AND CLEVELAND RAILROAD COMPANY v. TRUITT.

RAILROADS.—FENCES.—Suit against the railroad company for killing stock. The complaint alleged that the fence along the road took fire, and the servants of the company, to extinguish the fire, threw down a gap in the fence, which was negligently left open, &c.

Held, that the circumstances alleged were equivalent to an averment that the railroad fence was not properly maintained.

Held, also, that if the road was securely fenced, and the fence was accidentally destroyed by fire, and was rebuilt within a reasonable time afterward, the company was not liable for the injury.

Held, also, that the court correctly refused to instruct the jury, "that the fact that hands of the company working in the gravel pit had notice of the defect in the fence, would not bind the company, but that such notice must have come to some person or agent connected with keeping up the fence, or to some agent of the company."

APPEAL from the *Delaware* Common Pleas.

FRAZER, J.—Suit by the appellee against the appellant, for killing cattle upon the defendant's railroad; it being alleged that the fence along said railroad took fire, and, while burning, the servants of the defendant, to extinguish the fire, threw down the fence, making a gap therein, which

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was negligently left open by said servants, they seeing the plaintiff's cattle in the pasture adjacent, so that they escaped upon the track, and were killed by the cars, &c. There was a demurrer overruled to the complaint, which is assigned for error. We think that the circumstances alleged are equivalent to an averment that the railroad fence was not properly maintained, and, therefore, that the complaint was sufficient.

The answer contained four paragraphs, which, however, amounted to: 1st, general denial; 2d, that the fence was torn down for the purpose of extinguishing the fire, and was repaired as soon thereafter as the same could reasonably be done, and that the injury occurred before the defendant had notice, or had time to repair the fence. Reply, general denial. Verdict and judgment for the plaintiff.

The evidence established the circumstances alleged in the complaint, viz: that the fence was torn down by the railroad hands, in the evening, about 5 or 6 o'clock, they happening to discover the fire as they were passing on a hand car, and it was rebuilt early the next morning by the same hands. The cattle were killed during the night. They were in the field when the fence was torn down. The employees of the defendant testified that the fence was not repaired in the evening for two reasons: 1st, because it was time to quit; and 2d, because the fire rendered it impossible to do so. There was a pond of water ten or fifteen rods from the place where the fence was burned.

The court refused, on the defendant's motion, to instruct the jury that if the road was securely fenced, and the fence was, by accidental fire, destroyed at the place, &c., and if it was repaired within a reasonable time afterward, the defendant is not liable for the injury. This instruction expresses the law, as positively declared by this court in *The Toledo, &c., Railroad Co. v. Daniels*, 21 Ind. 256. We think it sound law. That case is in no respect inconsistent with the case in 22 Ind. 316, but, on the contrary, is referred to and recognized in the opinion

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in the latter case. It is contended in argument that the instruction under consideration was not applicable in the case at bar, because here the defendant, by its servants, had notice at the very moment that the fence was thrown down. That circumstance would be proper for consideration in determining what would be a reasonable time for rebuilding the fence, in this particular case; but surely it could not be available to require the thing to be done sooner than it could reasonably be accomplished. The instruction was applicable to the case, and ought to have been given.

The following instruction asked by the defendant was refused: "The mere fact that hands, working in the gravel pit for the company, had notice of the defect in the fence, would not bind the company. The notice, to be binding, must be proved to have come to some person or agent connected with the keeping up or repairing fences, or some agent of the company. Notice to a laboring hand would not be sufficient." This was correctly refused. It assumed, as matter of law, that a *laboring hand* could not be charged with the repair of the fences; and, besides, it was calculated to mislead the jury, by creating the impression that the defendant was not bound to make the repairs unless notified of their necessity.

The court instructed the jury, that "the defendant, however, is bound to maintain the fence along their road, although it may be destroyed by accidental causes." This is good law, but, in the present case, it was calculated to mislead the jury. It ought to have been accompanied by the further proposition, that in case of such accidental destruction, a reasonable time is allowed to enable the repairs to be made. The turning point of the case, as made by the evidence, was whether the fence was repaired as soon as it could reasonably have been done, and the law of the case, in that respect, ought to have been given to the jury.

We do not regard the verdict as so clearly right under the evidence as to justify us in affirming the case, notwith-

standing the foregoing errors; and yet, if the case had been properly left to the jury, we do not know that we would be at liberty to disturb the verdict.

The judgment is reversed, with costs, and the cause remanded for a new trial.

J. Davis and *W. March*, for appellant.

T. J. Sample, for appellee.

RUNYAN and Others v. McCLELLAN and Others.

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133 281

DEED—RECORD OF.—A executed to B a deed for certain real estate, which was not put on record for more than a year. After the making of the deed, but before it was recorded, C recovered a judgment against A, upon which D became replevin bail, neither of them having any knowledge of the unrecorded deed, and D having entered himself as bail on the judgment in the belief that the land belonged to A. Suit by C and D to subject the land, alleging the insolvency of A.

Held, that C acquired by his judgment no lien on the land, because A had then no interest in the land to which the judgment could attach, and the failure of B to put his deed on record could give to C no interest in, or lien on, the land.

Held, also, that D could occupy no better position than the judgment plaintiff, and if the deed was valid against him, it was also valid against the replevin bail.

Held, also, that construing secs. 11 and 16 of the act concerning real property, 1 G. & H. 259, 260, together, they must be held to mean that a deed not recorded within ninety days is void only as to a person who has, without notice, in good faith, and for a valuable consideration, acquired a legal interest in the land.

APPEAL from the *Johnson Common Pleas*.

ELLIOTT, C. J.—This was an action by *Israel Runyan* and *McDonald & Roache* against *Joseph McClellan*, *Jacob McClellan* and *William Barnett*. The complaint consists of three paragraphs. Upon the first and third issues were made, and tried by the court, who found for the defendants. To the second paragraph the court sustained a demurrer, and this ruling presents the only question for the consideration of this court.

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That paragraph alleges substantially these facts: On June 12th, 1860, *Joseph McClellan*, one of the defendants, by deed in fee, conveyed to the other defendants, *Jacob McClellan* and *William Barnett*, a lot of ground in the town of *Franklin*, *Johnson* county, describing it. The deed thus made was not recorded until the 12th of June, 1861. In the meantime, viz: at the *February* term, 1861, *McDonald & Roache*, two of the plaintiffs, recovered a judgment against the defendant, *Joseph McClellan*, in the *Johnson* Common Pleas, for \$990, and on the 20th of *February*, 1861, the plaintiff, *Runyan*, became replevin bail on that judgment. When *McDonald & Roache* recovered said judgment they had not, nor had they at any time until said deed was recorded, any knowledge of its existence. *McClellan*, at the time of the entry of the judgment against him, was, and at all times since has been, and still is, wholly insolvent. It is averred that *Runyan*, prior to the entry of replevin bail, was assured by said *Joseph McClellan*, that the lot in question was unincumbered; that he examined the recorder's office of said county, and found the same unincumbered, and the title thereof to be in *Joseph McClellan*; and fully believing that said *Joseph McClellan* was the owner of the lot, he was induced to, and did, become such replevin bail. It is further averred that said *Runyan* had no notice or knowledge of said deed until after it was put on record, and that the judgment against *Joseph McClellan* remains wholly unpaid.

Does the paragraph present a good cause of action? In framing it, the pleader probably intended to base it on § 11, of the "Act concerning real property and the alienation thereof," 1 G. & H. 259, which declares that, "No conveyance of any real estate in fee simple, &c., shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded within the time, and in the manner provided in this act." The sixteenth section of the act provides when and where such deed shall be

recorded, and its provisions must be looked to in ascertaining the proper construction to be given to, and the effect of, the former section. The latter provides that "every conveyance or mortgage of lands, or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every such conveyance or lease, not so recorded within ninety days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser or mortgagee, in good faith, and for a valuable consideration." In this case, the deed was not recorded within the time limited by the statute, nor until after the recovery of the judgment in favor of *McDonald & Roache* against *Joseph McClellan*, the grantor, and the entry of replevin bail thereon by *Runyan*.

Under the provisions of §§ 526 and 527 of the code, 2 G & H., 263, 264, the judgment was a lien, from the date of its rendition, on all the lands of the said *Joseph McClellan*, whether in possession, reversion, or remainder, &c. But as he had sold and conveyed the lot in controversy to *Jacob McClellan* and *William Barnett*, long prior to the date of the judgment, he had no title or interest in it, at that time or afterward, to become the subject of a judgment lien. The judgment plaintiffs, therefore, acquired no lien on, or interest in, the lot by their judgment.

The deed was valid as against *Joseph McClellan*, the grantor and judgment defendant; and as the plaintiffs, *McDonald & Roache*, can only claim an interest in the lot by virtue of their judgment attaching as a lien thereon, through a title in him, and as no such title existed, it follows that a failure to record the deed within the time required by the statute, and the ignorance of the judgment plaintiffs of its existence, cannot create such lien. But it is insisted that *Runyan* was induced to become replevin bail on the judgment, under the belief that the title to the lot was in *Joseph McClellan*, and the judgment a lien thereon, and that, therefore, he is injuriously affected by the failure

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to record the deed within the time limited by the statute. By becoming replevin bail, *Runyan* became a judgment debtor, not a judgment creditor. The lien of the judgment operated not for, but against him, as it bound his real estate in the county for its payment; and if, by reason of his liability as such bail, he is regarded in the light of a creditor of *Joseph McClellan*, still, we are at a loss to see how he can occupy any better position than the judgment plaintiffs; and, therefore, in our judgment, if the deed is valid against the judgment plaintiffs, it must also be held valid as against the replevin bail.

In *Chenyworth v. Daily*, 7 Ind. 284, it was held by this court, that a mortgage of personal property, the mortgagor remaining in possession of the mortgaged goods, and the mortgage not being recorded within ten days from the date of its execution, was absolutely void as to creditors, and it is insisted that the statute under which that ruling was made, is similar to the one under consideration, and that the decision in that case is, therefore, decisive of the construction to be given to this statute. But we do not think so. There the statute provided that, "No assignment of goods and chattels, by way of mortgage, shall be valid against any other person than the parties thereto, where the possession of such goods," &c., "is not delivered to the mortgagee, unless such assignment shall be proved or acknowledged," &c., "and recorded," &c., "within ten days after the execution thereof." No exception is made as to persons having notice of the existence of the mortgage, and it was held, therefore, that it was absolutely void as against creditors. But in the case at bar, the eleventh section expressly excepts from the benefits of the statute persons having notice thereof; whilst section 16 only renders such an unrecorded deed to lands, "fraudulent and void, as against any subsequent purchaser or mortgagee in good faith, and for a valuable consideration." There is no conflict in these sections, and they must be construed together. Both, in effect, provide that such an unrecorded deed shall be valid

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as against all persons having notice thereof; whilst section sixteen more clearly defines the class of persons as to whom it shall be void, viz: "any subsequent purchaser, or mortgagee, in good faith, and for a valuable consideration." In looking at the provisions of both sections, and construing them together, we think it clear that the deed can only be held void as to a person who has, without notice, in good faith, and for a valuable consideration, acquired a legal interest in the land.

The paragraph of the complaint under consideration does not show that the plaintiffs, or either of them, have acquired such an interest, and the demurrer to it was, therefore, correctly sustained.

The judgment is affirmed, with costs.

S. Major, for appellant.

T. W. Woollen, for appellee.

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GOOKINS and Others.

94	169
129	594
24	169
150	569
24	169
1153	534

In the year 1856, the city council of the city of Terre Haute passed a resolution extending the city limits, by annexing thereto certain contiguous territory. Suit by the owners of the lots so annexed to enjoin the collection of taxes assessed by the city.

Held, that any defect in the proceedings of the council was cured by sec. 83 of the act of March 9, 1857, for the incorporation of cities, I G. & H. 239.

APPEAL from the *Vigo* Circuit Court.

ELLIOTT, C. J.—Suit by the appellees against *Edmunds*, Treasurer of the City of *Terre Haute*, to enjoin the collection of taxes assessed by the city on certain lots claimed to be within the city limits.

The common council of the city, in 1856, by resolution, extended the city limits, by annexing thereto certain con-

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tiguous territory on the south, and also on the north, of the city. Part of the plaintiffs own portions of the territory annexed on the south, and the others own portions of that annexed on the north.

Taxes were assessed by the city against the plaintiffs on the property so annexed, and they filed a complaint against *Edmunds*, the treasurer, to enjoin the collection of such taxes, alleging that the annexation is illegal and void.

Edmunds answered by general denial, and the parties agreed that all legal defenses might be given in evidence under that answer.

The cause was submitted to the court for trial, which resulted in a finding for the plaintiff, and a perpetual injunction against the collection of the taxes. *Edmunds* appeals to this court. The evidence is all in the record. It consists mostly of an agreement of facts by the parties, and admissions on the trial, and presents no question of conflict of evidence.

The facts are substantially as follows: The territory annexed on the south, by the resolution of the common council, was embraced by the original plat of the city, and known thereon as out-lots, regularly platted and numbered, and the plat duly recorded. The lots belonging to the plaintiffs varied in size from five to thirty acres, one lot containing sixty-five acres. The extension of the city limits on the north, by the resolution of the common council, embraced a part of the *sixteenth* section, known as school lands. In 1838, the school commissioner of *Vigo* county, being about to sell said section, and for the purpose of enhancing the value thereof at such sale, laid off and platted said section into lots and streets, but not for the purpose of their annexation to the city, but with a view to their better sale as school lands. The lots thus platted were regularly numbered on the plat, and varied in size from two to ten acres. They were sold by the school commissioner on the 15th of *December*, 1838. The plat was

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acknowledged and recorded in the recorder's office of the county, on the 26th of *March*, 1839.

At the time the plat was made and the lots sold, they were not contiguous to the city of *Terre Haute*, as the northern limit of the city did not extend to within a fourth of a mile of the south line of the school section; but, on the 6th of *February*, 1839, and before the plat of the section was acknowledged or recorded, the corporate limits of the city were extended to the south line of said section, whereby the lots so platted and sold by the school commissioner became contiguous to the city.

It was admitted on the trial that the city of *Terre Haute* was incorporated under the "Act for the incorporation of cities, approved *June* 18th, 1852."

A copy of the resolution of the common council extending the boundaries of the city so as to include the lots so annexed, was, on the 12th of *November*, 1856, together with a plat and map of survey, defining the metes and boundaries of such addition, filed and recorded in the office of the recorder of *Vigo* county.

The common council, in thus extending the city limits, acted under the authority of § 81 of the "Act for the incorporation of cities," 1 R. S. 1852, p. 220, which provides, "that, whenever there shall be lots laid off and platted, adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots; and the lots thus annexed shall thereafter form a part of such city, and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, together with plat and map of survey, defining the metes and boundaries of such addition, in the office of the recorder aforesaid, which plat shall be recorded."

It is urged by the appellees that the platting of the lots annexed by the resolution, on the south, on the original plat

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of the city, and numbering and denominating them out-lots on such plat, did not make them "lots laid off and platted," within the meaning of the statute. The reason urged is, that the statute referred to contemplates lots of less size, such as are usually laid off in cities or towns, for ordinary building or business purposes. It will be observed that the statute does not limit, or in any manner designate, the size or area of lots that may be so annexed, nor are we aware of any law existing at the time of this extension of the city limits, limiting the size of city or town lots, but it seems to be left entirely to the discretion of proprietors.

It is also insisted that the plat of the school section, by the school commissioner, was not "laying off and platting lots," within the meaning of the statute authorizing their annexation to the city by resolution of the common council.

It is conceded that the school commissioner did not subdivide the section into lots, and plat the same, for the purpose of having them annexed to, or brought within, the corporate limits of the city, for at that time they did not adjoin the city. The section was laid off into lots, and sold as such, for the purpose, no doubt, of realizing the largest amount possible upon its sale. The value of the lots would necessarily be greatly enhanced by their near proximity to the city; and they were so laid off and sold with the evident expectation that the city limits would soon be extended to them.

The plat was duly acknowledged and recorded, and the city limits, soon after the sale of the lots, were extended to them, and they thereby become contiguous to the city. Whatever, then, may have been the intention of the school commissioner, at the time of making the plat and sale of the lots, they were, at the time of their annexation by the city council, "lots laid off and platted, adjoining the city," and the plats recorded in the recorder's office of the proper county; and it is difficult to see why they could not be annexed to the city in the manner prescribed by the statute.

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Sections 82 and 83 of the same statute, authorize contiguous territory, "not platted or laid off," to be annexed, by application to the board of county commissioners; but, as this territory had been laid off and platted, and the plat recorded, it would seem that the jurisdiction of the county commissioners would thereby be defeated.

See, as to the word lot, as used in the statute, *The City of Evansville v. Page*, 23 Ind. 525.

But we do not deem it necessary to determine the question as to the validity of this annexation, at its date, as a subsequent statute, we think, covers any supposed defect that might exist.

The 83d section of the act of *March 9, 1857*, on the subject of the incorporation of cities, contains this provision: "Whenever any city incorporated under the acts hereby repealed, shall have, since the adoption of said acts by said city, heretofore, by a resolution of the common council, annexed any territory contiguous to said city, and shall have filed a plat or map of survey, defining the metes and boundaries of such annexed territory, in the office of the recorder of the proper county, such annexation of territory shall be deemed to be valid and effectual, and such annexed territory shall be deemed a part of such city, and within the jurisdiction of the same, from the time of the adoption of the said resolution." 1 G. & H., p. 239.

But it is argued that this provision was only intended as a saving clause, to save strictly legal annexations from the effect of the repeal of the statute of 1852, and that it was not intended as a curative provision. We do not think so. This case has been before this court once before, and will be found reported in 20th Ind., 447. It was then held that the annexation of the territory, by the common council, if not in strict compliance with the statute of 1852, was cured of any supposed defect by the statute of 1857, and we adhere to that opinion.

The judgment of the circuit court must, therefore, be reversed, as all other questions raised by the pleadings in

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the case, than the one here decided, were waived in the court below, by the agreement of the parties.

The judgment is reversed, with costs, and the cause remanded, with instructions to the circuit court to dissolve the injunction, and render final judgment in favor of the defendant, and against the plaintiffs below for costs.

C. Y. Patterson, W. Mack, J. N. Pierce and McDonald & Roache, for appellant.

Smith and Mack, for appellees.

24	174
138	178
34	174
128	231
24	174
156	622
156	623

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DEMURRER.—NEW TRIAL.—Any matter for which a new trial may be granted, as specified in sec. 352 of the code, must, in order to be available as error in the Supreme Court, have been made the foundation of a motion for a new trial in the court below. But rulings upon demurrers to pleadings are not within the rule. Page 177.

LIMITATIONS.—SUIT TO AVOID SHERIFF'S SALE.—Sec. 211, 2 G. & H. 158, which enacts that actions for the recovery of real property sold on execution, brought by the execution debtor, his heirs, &c., must be begun within ten years after the sale, does not mean that a sheriff's sale shall be beyond question after the lapse of ten years, where the possession of the execution defendant has not been disturbed during that period, nor that after the sheriff's sale has been declared void by judicial determination, it shall yet be protected by the expiration of ten years from its date. Page 178.

SAME.—But where nearly twenty years have elapsed after the date of the sale, and during all that time the purchaser has been in adverse possession, the statute does apply, and is a bar to an action for the recovery of the land. Page 178.

SAME.—It has been held by this court that the statute applies even where the court has not acquired jurisdiction over the persons of the owners of the land sold. Indeed, the statute would be useless, if it only protected titles which do not need protection. Page 177.

SAME.—Statutes against frauds cannot, as a general rule, be pleaded to protect a fraud; but it is not so as to statutes of limitations, except in peculiar cases in equity.

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MISDESCRIPTION OF LANDS.—The lands conveyed by a mortgage were described as "the south-west quarter of section 81, township 4 north, range 11 east, and also the following tract, adjoining the above described tract on the west, to-wit: forty rods in width off of the east side of the north-east quarter of section 86, township 4, of range 10 east, which said tract extends forty rods in width, as aforesaid, and from the north line to the south line of said last mentioned quarter section."

Held, that the description is repugnant and impossible, if effect be given to all of its terms, as the north-east quarter of section 86, &c., cannot adjoin on the west the south-west quarter of section 81.

Held, also, that there were two descriptions of forty acres in the mortgage, either of which, taken alone, would be perfect, and it was evidently not intended to convey both. If both are equally certain, then both must be held void, but if one is less likely to be erroneous than the other, the court will adopt the former, to give effect to the conveyance.

Held, also, that there was less probability of mistake in that part of the description which described the second tract, forty rods in width, as "adjoining the former on the west," than in the description of the quarter section, by numbers, in which such forty acre tract was situated, and hence the court will give effect to the former, and reject the latter.

MASTERS IN CHANCERY.—Under the statute of 1836, masters in chancery had general authority to take the acknowledgment of deeds.

APPEAL from the *Jefferson* Circuit Court.

FRAZER, J.—Complaint in three paragraphs. 1. In the usual form in ejectment under the code. 2. That the plaintiff is the owner in fee of the lands described in the first paragraph; that in *February*, 1839, he and his wife mortgaged the same to one *Mitchell*, to secure \$3,000; that on the 3d of *April*, 1841, *Mitchell* filed a bill in chancery for foreclosure and the sale of the mortgaged premises; that proceedings upon the bill afterward abated by the death of *Mitchell*, and were revived by his administrators *de bonis non*, (the defendant, *Stiver*, having first been appointed administrator and resigned,) and a decree for the sale of the lands obtained; that the sheriff, by virtue of an order of sale, issued *January* 26, 1844, sold the lands in one body, (the south-west quarter of section 81, township 4 north, range 11 east, and forty rods in width adjoining, off of the east side of the south east quarter of section 86, township 4 north, range 10 east, extending from the north to the

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south line of the last mentioned quarter section,) to the defendant, *Stiver*, for the nominal sum of \$300, and conveyed the same to him by deed; that the lands might have been sold in parcels without injury, so as to have satisfied the decree with a part of the lands; that the plaintiff, when the proceedings to revive the chancery suit were begun, resided in *Harrison* county, and that he had no notice of said proceedings, nor was any summons issued, nor had he any knowledge or information of the decree and sale; that he did not appear; that he did not learn of the same until *February*, 1859; that *Stiver*, by fraud, procured the sale, and made the purchase at \$300; that but for such fraud the lands would have sold for \$6000; that *Stiver's* wife was *Mitchell's* only child; that he was appointed administrator of *Mitchell* in 1842; that desiring to purchase the lands ("the Gray farm,") he resigned the administration, upon an agreement with *Pitcher & Phillips*, who were afterward the administrators *de bonis non*, that if they would secure to him the title to the "Gray farm," he and his wife would convey to them the "home farm," belonging to *Mitchell's* estate; that *Pitcher & Phillips* gave *Stiver* a bond, with surety, conditioned to carry out the agreement; that *Stiver* did convey the "home farm" to them; that the sheriff's sale of the "Gray farm" was, with *Stiver's* knowledge, conducted so as to avoid competition in bidding; that the land was, and is, worth \$6000; that *Stiver* holds possession without right, and, on request, in *February*, 1861, refused to give possession, and pretends to own the same in fee; that the other defendants are *Stiver's* tenants, &c. The third paragraph is like the second, except that it alleges no fraud against *Stiver*.

The defendants answered: 1st, general denial; 2d, that the cause of action did not accrue within twenty years before the suit was commenced; 3d, to the second and third paragraphs of the complaint, that the cause of action did not accrue within ten years before the commencement of the suit. The plaintiff demurred to the third paragraph of the answer; his demurrer was overruled, and he

excepted, and stood by his demurrer. There was a reply of general denial to the second paragraph of the answer. Trial by the court; finding for the defendants, and judgment thereon, after an ineffectual motion for a new trial by the plaintiff.

We are called upon to review the action of the court below upon the demurrer to the third paragraph of the answer. It is suggested on behalf of the appellees that, under the statute, the whole case could properly have been tried upon the first paragraph of the complaint, and the general denial thereto; that all other pleadings were unnecessary, needlessly incumbering the record, and that, therefore, this court could not reverse the case upon the pleadings. This would be correct, if under the second and third paragraphs of the complaint, no other relief could be obtained than the mere recovery of the possession of the lands, with damages. But a case of the kind might be so presented in the evidence, that though the plaintiff would have no right to the possession, he might nevertheless be entitled to have the sheriff's sale, or even the decree, vacated. We do not perceive that we can, on the ground urged, properly avoid meeting the question as to the sufficiency of the third paragraph of the answer. Nor was it necessary, as is insisted in argument, that the ruling upon the demurrer should have been assigned as a cause for a new trial. Errors of law occurring at the trial, it has been held by this court, are waived, unless taken advantage of upon such a motion. 2 G. & H. 214. And the general principle, now well settled, is that any matter for which a new trial may be granted, as specified in § 352 of the code, must, in order to be available in this court, have been made the foundation of a motion for a new trial below. *Kent v. Lawson*, 12 Ind. 675. But rulings upon demurrers to pleadings have been held not within the rule, because not within that section of the statute. *Commissioners, &c. v. Bilsland*, 12 Ind. 668.

It is enacted that suits for the recovery of real property
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sold on execution, brought by the execution debtor, must be brought within ten years after the sale. 2 G. & H. 158. The answer was evidently framed to make a defense under this statute.

In *Hutchens v. Lasley*, 11 Ind. 456, it was held that this statute was not applicable in a case where, in a suit to recover possession, brought by the purchaser, within the ten years, the sale had been declared void in this court, and the suit abandoned. In that case, the execution defendant was in possession when the first suit was brought. He could bring no suit to recover lands of which he held possession. The statute does not mean that a sheriff's sale shall be beyond question after the lapse of ten years, where the possession of the execution defendant has not been disturbed during that period. Nor can it mean that, after the sheriff's sale has been declared void by judicial determination, it shall yet be protected by the expiration of ten years from its date. The statute is one of repose; but to make such a use of it as that, would be to unsettle titles, and not to give them rest, and would defeat the object of the statute. But this case does not fall within the principle alluded to. Here nearly twenty years had elapsed after the date of the sale, and during all that time the purchaser had been in adverse possession of the premises. We speak of what the pleadings show. The statute was intended for exactly such a case, and to hold otherwise would be absolutely to nullify it. This court has held, in a case involving like principles, that the statute applies even where the court has not acquired jurisdiction over the persons of the owners of the lands sold. *Vanderve v. Milliken*, 13 Ind. 105; *Vail v. Halton*, 14 Ind. 344. Indeed, the statute would be useless, if it protected only titles which do not need protection.

But it is contended that no man can plead a statute to protect him in the enjoyment of rights fraudulently obtained. We do not concede this proposition in the broad terms in which it is expressed, and we know of no

authority which supports it, and none is cited. It is true that statutes against frauds cannot, as a general rule, be pleaded to protect a fraud. But we have never understood that it had been so held as to statutes of limitations, except in peculiar cases in equity. It is surely within the scope of legislative authority to say, that after the lapse of a given time, a transaction shall not be open to inquiry. In the case in judgment, it has been so enacted. There is no room to question the intention of the statute. It was designed to give security to those holding possession under titles arising under sales by sheriffs. This case is within the intention, and we must apply the law as we find it to exist.

It is contended that the court erred in finding for the defendants, as to the forty acres of land in section 36, township 4, range 16. This proposition rests wholly upon the effect to be given to the description of the lands as contained in the mortgage, and which was carried into the decree of foreclosure and subsequent proceedings under it. That description is as follows: "The south-west quarter of section 31, township 4, north, range 10, east; and also the following tract, adjoining the above described tract on the west, to-wit: forty rods in width off of the east side of the *north-east* quarter of section 36, township 4, range 10, east, which said tract extends forty rods in width, as aforesaid, and from the north line to the south line of said *last mentioned* quarter section." This description is repugnant and impossible, if effect be given to all its terms, inasmuch as the *north-east* quarter of section 36, township 4, range 10, cannot adjoin on the west the south-west quarter of section 31, township 4, range 11, as is apparent from a diagram.

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R. 10.		R. 11	
	N. E. Q ^r .		
Section	36.	Section	31.
	S. E. Q ^r .		S. W. Q ^r .

The mortgage was in form an absolute deed, with a separate written defeasance from *Mitchell* to *Gray*, of even date with the deed. In the defeasance, the land is described as being the same upon which *Mitchell* held a mortgage from *Gray* for \$1200, and the same upon which *Gray* then resided, containing one hundred and ninety-nine acres, more or less. The mortgage for \$1200, from *Gray* to *Mitchell*, describes the strip forty yards in width as being in the south-east quarter of section 36. It appears in evidence, also, that that, together with the quarter section concerning which there is no trouble as to description, constituted the farm upon which *Gray* resided when the first mentioned mortgage and defeasance were executed. Inasmuch as the deed and the defeasance, taken together, constitute the contract, both are to be looked at; and it would follow that no difficulty exists in ascertaining the lands mortgaged, and that a mistake in the scrivener, in writing *north* instead of *south*, is obvious. But the land was purchased by *Stiver* by the description in the last mortgage, and by that description it was exposed to sale by the sheriff, so that, after all, we must determine the question under consideration by the language used in the mortgage, without the aid of other circumstances; for the purchaser would take the lands struck off to him by the sheriff, and none other.

There are really two descriptions of forty acres in the mortgage, either of which, taken alone, is perfect, to-wit: a strip forty rods wide off of the east side of the north-east quarter of section 36; and a strip forty rods wide, adjoining on the west the south-west quarter of section 81. These are different tracts, and it was not intended to convey both. Can it be determined from the language employed which one is meant? If it can, then such determination settles the question. If both descriptions are equally certain, then both must be held void; but if one is less likely to be erroneous than the other, then the latter will be rejected as a mistake, for there is a mistake evidently. This is the rule to be deduced from the cases, for "the law shall make such construction as the gift by possibility may take effect." *Co. Lit.* 183, *b*. A man cannot be mistaken as to the location of a strip of land forty rods wide, adjoining on the west a quarter section with which he is acquainted, but he might easily mistake the number of the lot or section, or the particular quarter section of which it constituted a part. In a survey, courses and distances yield to monuments, or other objects of which the senses can take cognizance, and the most notorious of these are deemed the most reliable *indicia* of the intention of the parties.

In *Worthington v. Hylyer*, 4 Mass. 196, the land was described as "my farm in &c., on which I now dwell, being lot 17, &c., containing one hundred acres, with my dwelling house and barn thereon standing, bounded &c., having a highway through it." The boundaries given were those of lot 17, but the grantor's house and barn were not upon that lot, he did not reside upon it, nor was there a highway through it. It was held that the tract of land on which were the dwelling house and barn passed by the deed. In *McNaughton v. Loomis*, 18 Johns. 81, *S. C.*, 19 Johns. 449, the grant was of "part of lot 51, of the second division of a patent granted to *Isaac Sawyer* and others, in the town of *Cambridge*, &c., bounded &c.," giving metes and bounds, and monuments at the corners. The monuments were not

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to be found on lot 51, but were found on lot 50, corresponding with the boundaries mentioned in the deed. It was held that the tract passed which was designated by the monuments. SPENCER, C. J., in delivering the opinion of the court, said: "We have a right to presume, either that these monuments were erected by the parties prior to the conveyance, or that they went upon the land and ascertained them to be there. * * These monuments are part of the description, and a much more important part than the expressions in the deed, 'being part of lot no. 51, in the second division of a patent granted to *Isaac Sawyer* and others.' Indeed, I consider the number of the lot no more important than the fact asserted that the patent was granted to *Isaac Sawyer* and others; and suppose that this part of the description was untrue, and that it had been granted to *John Sawyer*, surely that mistake would not avoid the grant. * * * There is another principle applicable in the case. Here is a flat contradiction in the description, and then we ought to take that which is most stable and certain, * * and in point of certainty the number holds no comparison with the monuments." See, also, *Flagg v. Thurston*, 13 Pick. 150; *Bosworth v. Sturtevant*, 2 Cush. 392; *Bates v. Tymason*, 18 Wend. 300.

We are of opinion that there was no error in the finding as to the forty acres, and, without extending this opinion by a discussion of the evidence, we are of opinion that the whole finding was right upon the evidence.

There are some questions made as to the admissibility of certain deeds in evidence, but we deem them unimportant, inasmuch as, in the light of the views already expressed, the result must be the same, whatever might be our opinion upon these questions. We think, however, that under the statute of 1836, masters in chancery had general authority to take the acknowledgment of deeds.

A question is also made upon the record of the foreclosure suit, as to whether it was void for the want of

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proper notice to *Gray*. We have not examined that question, because the opinion already given, as to the statute of limitations, renders it an immaterial question.

The judgment is affirmed, with costs.

J. Sullivan, A. C. Dewey, H. W. Harrington and McDonald & Roache, for appellant.

M. G. Bright, R. J. Bright and C. E. Walker, for appellees.

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WARDEN OF NORTHERN PRISON—REMOVAL OF.—Under the law governing the Northern State Prison, the board of control of the prison have no power to remove the warden from office before the expiration of his term, except for cause, and where no cause is assigned, such attempted removal is illegal and void.

APPEAL from the *Marion* Common Pleas.

ELLIOTT, C. J.—Suit by *Selby* against *Wood* to recover the possession of a book case, of the value of \$100. *Wood* answered by a general denial. The issue was tried by the court, who found for the plaintiff, and, over a motion for a new trial, rendered judgment on the finding. *Wood* appeals.

The evidence is made a part of the record by a bill of exceptions, and consists solely of an agreement of facts between the parties, from which it appears that the right to the book case depends upon the question, which of the parties litigant is legally entitled to the office of warden of the Northern State Prison, claimed by both.

The agreement is as follows :

“It is agreed by the parties to this suit, that the right to the possession of said property depends on the following facts, to-wit:

“The defendant was, by the proper board of directors, appointed warden of the Northern State Prison, on the

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11th day of *March*, 1863, for the term of four years, gave bond, and was duly qualified and commissioned, and entered upon the duties of said office, and has continued therein to this date. That, on the — day of June, 1865, the said board, without assigning any reason or cause, removed said defendant from said office, and, on the same day, said board appointed said plaintiff to said office, as warden of said prison, who then and there gave proper bond, and was duly qualified. Now, if said board had power to remove said defendant from said office, without assigning any cause or reason therefor, and appoint said *Selby* to said office, then the plaintiff is entitled to said property, and to a judgment.

“This question is presented in good faith, to try the right to said office, and no question is to be presented or tried, but the power of the board thus to remove the old warden and appoint a new one; and the defendant may file a general denial, and give in evidence any fact bearing on the point.”

A. ELLISON, *Attorney for Selby.*

McDONALD & ROACHE, *for defendant.*”

Without discussing the propriety of the form of action adopted, to try the conflicting claims of the parties to a public office, we will examine the question presented by the agreement.

The solution of the question must depend on the construction to be given to certain legislative enactments, which do not possess the merit of that fullness of expression and clearness of meaning so desirable in statute laws.

In 1859, the legislature passed an act entitled, “An act to provide for the erection of a new prison north of the National road, election of officers therefor, making appropriations, and for the regulation of the same.” It provides for the election, by a joint vote of the general assembly, of three directors, who are constituted a board of control, to superintend the construction of a state prison north of the

National road, and who shall hold their office for the term of two years, and until their successors are elected and qualified. It made it the duty of the board of control to select, in the northern part of the state, a suitable site for the location of a state prison; and when the site so selected should be approved by the governor, it was the duty of the board of control to advertise for proposals for the erection of the prison, upon such plan, embracing walls, cell-houses, offices, and such other necessary buildings and fixtures as might be required to complete the establishment for the accommodation of the necessary officers and three hundred convicts, and the safe keeping thereof; and that, in letting the contract, or contracts, they should "provide for the working of one hundred and fifty convict laborers on the premises, at not less than seventy cents per day each." It was also made the duty of the governor, when necessary, to give his order on the warden of the old state prison for said number of convicts, whose duty it was, from time to time, to detail for such purpose the most trustworthy of such convicts, then in prison, as might be required, with a suitable number of guards for their control and safe keeping; and further provided, that the board of directors, before the removal of said prisoners, should provide a place for their temporary safe keeping during the time they should be employed on said prison.

Section 7 enacts that, "A competent and skillful person shall be selected by the said board, who shall remain on the prison grounds, and superintend the erection thereof, and see that the work is faithfully and well done, according to contract, and shall make monthly estimates of the work done, under oath, and also the amount of convict labor performed in the same time, and file the same with the auditor of state, who shall, in issuing his warrant to the contractor, or contractors, after deducting the convict labor performed for each, retain ten per cent. from the estimate, until the work is fully completed according to the contract made."

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The ninth section provides that, "The person whose appointment is provided for in section 7 of this act, shall, under the supervision and control of the board aforesaid, discharge the duties of warden of said prison, until his successor is elected and qualified, or until he shall be removed, and a new appointment be made by the said board, who are hereby invested with full power for that purpose."

Section 13 reads thus: "All laws and regulations in force in reference to the government of the convicts, officers, and other matters in the present state prison, shall be continued in force in reference to the management and control of this prison, so far as the same can be made applicable."

This act makes no provision authorizing persons convicted of crimes to be sent to the northern prison, as a prison for punishment. We have given the substance of its material provisions, for the purpose of showing that its primary or principal object was to provide for the *building* of a new state prison in the northern part of the state, preparatory to the reception of convicts, and not for the officering and governing the same as a prison in existence, receiving convicts. And, but for the fact that it was deemed expedient to work a part of the convicts, then in the old prison, to aid in the construction of the new one, there would have existed no necessity for providing that any person should discharge the duties of warden, as no such duties would have existed. But, as the act only provided for the use of a limited number of convicts temporarily, and for a specified purpose, it seems not to have been deemed expedient to require the election of a regular warden during such time; and hence the provision, that the person appointed to superintend the work in the construction of the prison, should, under the direction and control of the board of directors, discharge such duties of warden as might result from the employment, for the time, of a limited number of convicts.

The law very properly provided that a competent and skillful person should be selected to superintend the con-

struction of the work, and see that it was done according to contract, and make the proper estimates of the amount done, at stated periods, upon which the contractors received their pay. These were his principal and important duties, and, hence, it was required that he should be selected with reference to his skill and ability for their faithful performance.

With these preliminary observations, we pass to a more critical examination of section 9. It provides that the person appointed to superintend the work, under section 7, "shall, under the supervision and control of the board aforesaid, discharge the duties of warden of said prison, *until his successor is elected and qualified*, or until he shall be removed, and a new appointment be made by the said board, who are hereby invested with full power for that purpose." Now, looking to the provisions of the act of 1859, alone, it seems evident that the directors have no power to elect or appoint a warden, as such, or to authorize any other than the person selected to superintend the work on the prison, to discharge the duties of warden, or to allow the person so appointed any other or greater compensation, for all the services required of him, than three dollars per day for the time employed, unless such power can be inferred from the words used in the ninth section, "*until his successor is elected and qualified*," taken in connection with section 13.

The transposition of the last two members of the ninth section, without altering the sense, will, we think, render the proper meaning of the section more palpable. It would then read, that the person appointed to superintend, &c., "shall, under the supervision and control of the board aforesaid, discharge the duties of warden of said prison, until he shall be removed, and a new appointment be made by the board, who are hereby invested with full power for that purpose, *or until his successor is elected and qualified*." If these latter words have any meaning, as used in the section, we think they must relate to the election and qualification of a warden, as such, and not to the person

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appointed to superintend the work on the prison, and who is required to discharge the duties of warden for the time. The latter is not referred to in the act as a person to be elected or qualified, either by taking an oath or giving a bond. He is not even denominated in the act as a superintendent, but as "a person" selected or appointed, whose duty it shall be to superintend, &c. We do not think that he can be considered an *officer* of the prison, in the proper legal sense of that term, but simply as an employee of the board of directors, selected by them, subject to their direction and control, and liable to be dismissed and removed by them at pleasure, and whose employment would necessarily cease when the prison should be completed. It is to this "person" that the ninth section refers, in providing that he shall discharge the duties of warden "until he shall be removed and a new appointment be made by said board, who are hereby invested with full power for that purpose," and not to a warden of the prison, regularly elected and qualified.

By the thirteenth section, the laws and regulations in reference to the old prison, for the government of the convicts, officers and other matters, are put into force in reference to the management and control of the new one, as far as the same can be made applicable. None of the laws and regulations referred to could be made applicable until the contract for the construction of the new prison was let, and the work commenced, nor then, until there was something in existence for them to apply to. As the work on the new prison progressed, in connection with the employment of convict labor, these laws and regulations would be brought into active force by the existence of that to which they would properly apply, until finally, when the prison should be completed, or had so far progressed toward completion as to justify making it a receiving prison for convicts, then, perhaps, all the laws and regulations of the old prison, not inconsistent with the express provisions of the statute authorizing the building of the new one,

would become applicable to it, and if so, they are made to apply by the thirteenth section.

By an act approved *June 1*, 1861, to authorize the removal of convicts from the southern to the northern state prison, &c., Acts of 1861, special session, p. 81, the governor was required to direct the removal of two hundred convict laborers from the prison at *Jeffersonville* to the northern prison, and it was made the duty of the warden of the northern prison to receive and properly take care of them, and employ them in the best manner to insure the speedy completion of the work on said prison.

The second section of that act provides, "That hereafter, when any male person, or persons, shall be convicted and sentenced to imprisonment in the state prison, by any court of competent jurisdiction, in the counties of *Warren, Fountain, Montgomery, Boone, Hamilton, Madison, Delaware* and *Randolph*, and in any county lying north of said counties, within this state, it shall be the duty of the sheriff, or officer having charge of such person, or persons, so convicted, to convey the said person, or persons, to the northern state prison, and the warden of said prison shall receive all persons so delivered to his care, and keep them until the expiration of their sentence, unless sooner discharged according to law." Thus, it is seen that the northern prison became the receptacle for all convicts from a specified portion of the state, and the *third* section of the same act provides that, in the event of an emergency therein stated, a part, or all, of the convicts in the southern prison may be sent to the northern prison.

These provisions seem to render it proper, if not absolutely necessary, that the northern prison should be fully officered, and placed under proper discipline and government, requiring that all the laws and regulations in reference to the southern prison, for the government of the convicts, officers and other matters, should be applied to the northern prison, as far as the same could be made applicable.

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Section 4, of the act of 1857, in reference to the southern prison, provides that, "the directors shall elect a warden, who shall hold his office for the term of four years, unless sooner removed by the directors for cause, which cause shall be entered on the journal of the institution. The warden shall receive as a compensation for the services required of him by law, such yearly salary, not exceeding sixteen hundred dollars, as to the directors may appear reasonable," &c. "The warden shall take and subscribe an oath or affirmation that he will faithfully and impartially discharge the duties of his office, and he shall give bond to the State of Indiana, in the sum of thirty thousand dollars, with surety," &c. This is the only law that we are aware of, authorizing the election of a *warden* of either of the state prisons, and the only one requiring the warden to qualify, by being sworn and giving a bond for the faithful discharge of his duties. If it is applicable to the northern prison, so far as to authorize the directors to elect a warden, and require that he shall take an oath of office, and give bond, we are at a loss to see why it is not also applicable to the term of his office, and the mode and cause of his removal.

We therefore conclude, that at the time *Wood* was elected or appointed to the office of warden, and at the time of his removal from said office, the section of the act of 1857, above quoted, was in force, and was applicable both to his election and removal; that having been elected in 1863, for the term of four years, and having taken the proper oath of office, and given bond as required by the law, he was entitled to hold the office for the full term of four years, unless removed for cause; and that, as no cause was given or assigned for his removal, such removal was illegal and void. The judgment of the court below must, therefore, be reversed.

The judgment is reversed, with costs, and the cause remanded.

Mr. Justice FRAZER dissented, and delivered the following opinion :

I cannot concur with the majority of the court in the construction of the ninth section of the act of 1859, 1 G. & H. 472. That the "person" whose appointment is provided for by section 7, is an officer, seems to me plain. The English definition of an officer, as given by the courts and text writers of that country, is, of course, not applicable here, because, under our institutions, officers can only be public. The American definition, as given, is, "the right to exercise a public function or employment, and take the emoluments belonging to it," 2 Bouv. L. Dic. 260; 3 Serg. & R. 149. An officer, then, is one lawfully exercising the functions of an office. That he might be removed at the pleasure of the board of control does not change the matter, for the power of removal of an officer at will is incident to the power of appointment, unless the statute has otherwise provided. *Ex parte Hennen*, 13 Pet. 230. In this case his duties are public, are exceedingly important and responsible, and his pay is not the subject of contract, but is fixed by law. I know not what more is necessary to constitute an officer. If an officer, then he was required by law to take an oath of office. 1 G. & H. 163. It was a singular oversight in legislation that a bond was not required of him, holding, as he does, the key which admits the contractors to the public treasury, and charged also, as he is, for a time, at least, and I think, during his continuance in office, with the duties of warden.

He must, under the control of the board, discharge the duties of warden of the prison. How long? Not until the board think proper to lessen his duties by appointing a warden, but so long as he remains in office,—“until his successor is elected and qualified, or until he shall be removed, and a new appointment be made by the board, who are hereby (by the act,) invested with full power for that purpose.” If he be not out of office, he can have no successor; nor can he be removed, and yet continued, without

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interruption, in the same office, though relieved of a portion, and the least pleasant, of his duties. If it had been intended to empower the board so to relieve him, by electing a warden, whenever, in their judgment, that would be desirable, it seems to me in the highest degree improbable that the legislature would not have employed language better calculated to express that purpose.

There was, and yet is, an obvious reason for charging the person who superintends the construction of the prison with the duties of warden, and providing that he should be removable at the will of the board. It was contemplated that the prisoners would labor upon the structure. They should be controlled by the person who superintends the work, that the best interests of the state may be subserved, by securing harmony in the use of this force which labors for the state, and thus insuring its greatest efficiency; and by making the duration of that person's office depend upon the will of the board of control, who are provided for the express purpose of guarding the public interests, he is put immediately under their direction, with the strongest motive to deserve their full confidence. A warden, whose official term, in the old prison, is four years, and who cannot be removed except for cause, and who is the chief executive officer of the institution, would be more independent. The new prison thus officered, while being built, would have too many executives, with danger of the usual result thereof, as all experience proves, divided counsels and consequent inefficiency in accomplishing the chief end sought, which was the erection of the prison, by no means accomplished in 1863, or even now.

I believe that this person, who is to superintend the work, and also discharge the duties of warden, by the act of 1859, has, from the beginning, in the official public reports, been called "warden," though the act does not give a name to his office. Doc. Jour. 1861, pp. 443, 438, 440, 446-455, 494; Doc. Jour. 1863, vol. 1, part 2, pp. 54, 56, 63, 67, 141. The legislature itself, in a public law,

passed two years before any attempt was made to confer upon him the term of four years, belonging to the warden in the old prison, so designated his office. Acts Special Ses. 1861, § 1, p. 81. By this designation it seems that both *Wood* and *Selby* were appointed. For brevity, it is, perhaps, as appropriate a term as any to indicate the office, and certainly it is sufficiently definite for that purpose. The law fixes its tenure and points out its duties, and it is clear that the directors, by giving it a name, could not change either the one or the other, nor could they, by electing him for four years, deprive themselves, or their successors, of whatever power of removal may be conferred by law.

If I am correct in the foregoing observations, the conclusion inevitably results, that the person whose appointment is provided for in section 7 of the act, must discharge the duties of warden of the northern prison, and that he may be removed at the pleasure of the board of control. It would follow that the board had power to remove the appellant, as they did, and appoint the appellee, and that the latter is now entitled to exercise the duties of his appointment. This conclusion is somewhat confirmed by the history of the passage of the act through the legislature. It appears by the journals that it originated in the House of Representatives, and passed that body without the thirteenth section, which extends the laws relating to the old prison to the new one, so far as applicable. It is thus quite evident that section 9 was not framed with any view to confer authority upon the board of control to take the duties of warden from the person whom section 7 requires to be appointed. Section 13 was added in the senate, as an amendment. Senate Jour. 1859, p. 920. That it was not intended thereby to change the effect of the language employed in section 9, seems clear to me. It was, I think, merely designed to cover what was omitted in the bill as it passed the house, by providing additional and necessary machinery for the organization and management of the new institution,

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which should be entirely in harmony with the provisions already contained in the bill.

J. E. McDonald and *A. L. Roache*, for appellant.

A. Ellison, for appellee.

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COMPUTATION OF TIME.—Where an act is to be done within a given number of days "from the time of the contract," the day upon which the contract was made must be counted as a whole day, in making the computation.

COURT OF COMMON PLEAS.—JUDGE PRO TEMPORE.—The record of an appeal from a court of common pleas showed that the judge of the court, being unable to attend at the term at which the judgment was rendered, appointed J. S., "a suitable person, and a member of the bar of the State of Indiana, and an attorney of said court," to hold the court for him.

Held, that the words used to describe the person appointed to hold the court, sufficiently show a compliance with the statute, which requires such appointee to be "a regular practicing attorney of the state."

UNCONSTITUTIONALITY OF LAWS.—The court should not strike down an act of the legislature for unconstitutionality, unless it be *clearly* in conflict with the constitution. The acts of the legislature are entitled to respect, and great caution should be exercised in setting them aside.

JUDGE PRO TEMPORE OF COMMON PLEAS COURT.—The act authorizing the appointment of a judge *pro tempore*, to hold the court of common pleas, in the absence of the regular judge, is constitutional.

APPEAL from the *Bush* Common Pleas.

FRAZER, J.—This was an action to recover damages for the breach of a contract, made on the 12th of *November*, 1868, for the sale and delivery of certain cattle. The second paragraph of the answer avers that "it was especially agreed and contracted, and was a part of the consideration, and of the essence of said sale, that the plaintiff should come and accept said cattle within seven or eight days from the time of said contract. That defendant was, at all times, up to and including the 19th day of *November*, 1868, ready to deliver said cattle, but that

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151	268
24	194
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the appellant failed to demand said cattle until the 20th of November, 1863, when the appellant demanded the cattle, and the appellee refused to deliver them, &c."

To this a demurrer was overruled, and upon this ruling error is assigned.

The question presented is, whether the demand was made in time. This depends upon whether the day on which the contract was made is to be computed as a whole day, or not. Eight days were given "from the time of the contract." In such computations, the rule of the law is not to regard fractions of a day, in pursuance of which, the day upon which an act is done is either excluded entirely, or counted as a whole day. The authorities are not harmonious upon this question, and as it is important that the rule in this state should be at rest, so that parties to contracts may know what to depend upon, we follow, without inquiry, the latest ruling of this court upon the subject. It was in *Tucker v. White*, 19 Ind. 253, where it was held, that in computing time "from the time of signing judgment," which was done on the 20th of September, that day must be counted; and the judgment was reversed because the court below had excluded that day in making the computation. We are perfectly aware that this case cannot be reconciled with some earlier ones of this court, but the court below, in the present case, did right in following the latest decision, and we shall not disturb its action.

The record before us shows that the judge, being unable to attend at the term of the court at which the judgment was rendered, appointed *John S. Scobey*, "a suitable person, and a member of the bar of said state (*Indiana*), and an attorney at said court," to hold the court for him. It is objected that *Mr. Scobey* is not shown to have possessed the qualifications required by statute.

The statute provides that the appointee shall be "a regular practicing attorney of the state," and the inquiry is, whether *Mr. Scobey* is shown by the record to have been

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such. In deciding a question of this kind, involving, probably, many other cases disposed of at that term, and where its decision might work vast injury and loss to numerous private parties, it would be monstrous to be controlled by mere verbal criticisms, or nice differences which may be found to exist in the meaning of words. The substance only must be looked to, and if, in that respect, the qualifications of the appointee are shown to be what the statute requires, then the objection must fail, though the fittest form of words may not have been used to express it. By the words, "a member of the bar of said state, and an attorney at said court," we find no difficulty in understanding the gentleman to be a practicing lawyer. The expression could not be used, with any propriety, to designate a mere voter, who had simply proven a good moral character, and taken an attorney's oath. Such an one "may practice law," in the language of the constitution, but he could not be called an "attorney," or "a member of the bar," without an abuse of language. By these terms, we generally understand a man whose vocation is the legal profession, i.e., a practicing attorney. And when one has retired from the profession, to engage in another pursuit, or to enjoy the evening of life in quiet, we do not, generally, speak of him as an attorney, but as a merchant, or farmer, or the like, or as *having been* an attorney.

But the constitutionality of the act of the legislature, authorizing common pleas judges to appoint attorneys to act for them, is questioned, and the point is maintained in argument with much ingenuity.

The constitution is paramount to any statute, and whenever the two are in conflict the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends toward the destruction of popular liberty, by gradually destroying the constitu-

tional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can, therefore, be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts, in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute, unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon legislative action as rare a thing as it ought to be, and secure that harmonious co-operation of the two departments, and that independence of both, which are essential to good government.

With these preliminary observations, deemed called for at this time, as an expression of our purpose to adhere to ancient landmarks, let us examine the question in hand.

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The seventh article of the constitution of the state contains all that is relied on in support of the objection now made. It provides that the judicial power shall be vested in a supreme court, circuit courts, and such inferior courts as the legislature may establish; that the judges of the supreme and circuit courts shall be elected by the people, for six years, but that provision may be made by law, for holding the circuit court, when the judge thereof shall be temporarily unable to attend.

It is argued, that inasmuch as the constitution expressly gives authority to the legislature to provide by law for holding the circuit courts, when their judges are unable to be present, and is silent as to the inferior courts, the maxim, "*expressio unius est exclusio alterius*," applies. We think not. Where there is a necessity for mentioning a particular thing, but none whatever for mentioning another thing, to regard the mention of the former as intended to exclude the latter, would be an exceedingly unnatural and unreasonable rule of interpretation. Here, the power of the legislature to establish courts, inferior to the circuit court, is given in the broadest terms, without any restriction as to the mode of selecting the judges; and, consequently, the legislature might provide for any number of judges, and any mode, or modes, for their selection, which its wisdom might suggest. Not so as to circuit judges; the constitution had fixed their number, one only for each circuit, who must be elected by the people. Without express authority, therefore, it would not have been competent for the legislature to provide by law for a temporary judge, to be appointed to act while the judge elected was in office. Hence, the necessity of an additional section to give that authority. But, as to the inferior courts, it would have been a work of supererogation to attempt to enlarge a power already given in terms comprehensive enough to include every possible thing.

We conclude, therefore, not merely that it is not clear that the act in question is unconstitutional, but that it is

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undoubtedly within the purview of legislative authority. That it is so is a matter of congratulation. The case at bar involves but a few dollars, but a different decision of the question would have involved consequences, and wrought mischief, which no man can calculate.

All the judges concurring, the judgment is affirmed, with costs.

T. A. Hendricks and *O. B. Hord*, for appellant.

L. & W. O. Sexton, for appellee.

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CONDITION—WAIVER OF.—Where money is stipulated to be paid upon a condition expressed, and, subsequently, a promissory note is given for the amount, payable without condition, the condition must, in the absence of fraud, be regarded as waived.

INSTRUCTIONS.—Instructions based on a hypothetical case, where there is no evidence tending to make the case supposed, are out of place, and ought not to be given, as they are only calculated to mislead the jury.

PROMISSORY NOTE.—VERBAL CONDITION.—A verbal condition cannot be annexed to a promissory note, or other written contract. A verbal contract may constitute the consideration of a written contract, but a note for a given amount cannot be trammelled with a verbal condition, which shall make it obligatory for a less sum.

APPEAL from the *Owen* Common Pleas.

FRAZER, J.—This case is now here the second time. Upon the last trial, the court below seems to have disregarded the law, as declared by this court when the case was formerly before it. 20 Ind. 198.

The foundation of the action was, at first, two promissory notes, given by the intestate to the appellant. After the cause was remanded by this court for a new trial, a paragraph was added upon a *quantum meruit*, for services rendered as a physician. New pleadings were then filed by the defendant: 1. The general denial. 2. As to the notes,

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that when they were given the intestate was insane, with some additional averments, which amount to nothing. 3. The same, in substance, as the second. 4. Fraud in procuring the notes, in this, that the plaintiff was treating the intestate for a cancer, and falsely and fraudulently pretended that he was curing it, relying upon which, the intestate was induced to execute the notes, and for no other consideration; that the plaintiff's representations were false; that the cancer was, in fact, growing worse, and the intestate afterward died of it. 5. Want of consideration for the notes. 6. As to the paragraph for services, that they were performed upon an express contract to cure, or receive nothing for the services. The reply was a general denial.

There was a verdict for the defendant.

The evidence disclosed that, in the first place, the plaintiff entered upon the treatment of the intestate for a cancer, in the month of *June*, under a contract to be paid \$200 if he effected a cure; if no cure was effected, then he was to receive \$100, he guaranteeing to do "\$100 worth of good." It also appeared that the deceased, during treatment, refused to pursue the plaintiff's proper directions as to diet and exercise, whereupon the plaintiff, in *September*, informed him that treatment was useless, unless the directions were obeyed, and refused to treat him further, unless he would give his note for \$200, which was done without conditions, the deceased being advised that he would be compelled to pay it. The medicines used were local applications, rendering him temporarily unfit for business, in consequence of the pain produced. Whether the treatment actually resulted in any benefit, or not, is not certain from the evidence. The deceased thought he was benefitted to the value of \$100. The services of the plaintiff were worth \$100. The note for \$25 was for a surgical operation performed by another physician, on the face of the deceased, the cancer being on the under lip.

The court refused to instruct the jury that, if the contract was made in *June*, and if the note for \$200 was

given in *September*, the giving of the note would, in the absence of fraud, be a waiver of the conditions of the original contract. The court held in this case, when it was formerly here, that this instruction ought to have been given. The legal proposition is a very plain one, and was exactly applicable to the evidence upon the last trial. It is surprising that it was refused.

The court instructed the jury, that "if the original contract was continued in force, qualified only by an increase of the amount to be paid, then the plaintiff must show that he has performed his undertaking in that behalf; and if the jury should believe that one of the stipulations of the original contract was that *Swank* should have only \$100, and that the doctor was to render the deceased that much good, and that that stipulation was continued in force at the time that the notes sued on were given, and, further, that the doctor did, in fact, do said deceased \$100 worth of good, then the plaintiff ought to recover \$100, and no more, on the \$200 note. But, if the plaintiff did not do the deceased \$100 worth of good, then the plaintiff will not be entitled to recover anything on said note." This ought not to have been given, for the reason that there was no evidence, in this case, to which it could be applicable. Instructions based on a hypothetical case, when there is no evidence tending to make the case supposed, are simply out of place, and ought never to be given. They can only mislead the jury. But this did not contain the law. A verbal condition cannot be annexed to a promissory note, or other written contract. A verbal contract may constitute the consideration of a written contract, but a promissory note for \$200 cannot be trammelled with verbal conditions, which shall make it obligatory for a less sum. The evidence of the conditions would be inadmissible. In this case, no such evidence was even offered. The proof was distinct, that, in consequence of a refusal on the part of the patient to obey directions, the physician refused longer to attend, unless a note for \$200 was executed to him. No

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conditions were exacted. The note was given unconditionally, with the understanding that it must be paid. The patient was further advised by the physician, that treatment, without obedience on his part to the directions concerning food, &c., would be unavailing.

There were other instructions given, equally objectionable on account of their want of application to the evidence, but it is unnecessary to notice them in detail.

The verdict, too, was not at all justified by the evidence.

The judgment is reversed, with costs, and the cause remanded for a new trial.

W. Franklin, for appellant.

S. H. Buskirk, R. T. Rose and McDonald & Roache, for appellee.

RUBOTTOM v. MORROW, Administrator of RUBOTTOM.

ADMINISTRATOR.—LIABILITY FOR LOSS BY FIRE.—An administrator must be held to adopt such precautions against the loss of property by fire, as prudent men are, under similar circumstances, accustomed to exercise.

SAME.—RENTS OF REAL ESTATE.—Ordinarily, an administrator is not chargeable with the rents of real estate accrued during his administration.

EXECUTOR.—RIGHT TO POSSESSION OF REAL ESTATE.—Real estate, unless otherwise disposed of, goes to the heirs, and not to the executor, and a mere power given to the executor to sell real estate, does not give him a right to the possession thereof. To entitle him to such possession, the land, or its usufruct, must be expressly given to him by the will.

APPEAL from the *Franklin* Common Pleas.

FRAZER, J.—This was a suit against an administrator, with the will annexed, for waste and mal-administration. The judgment below was for the defendant. The cause was tried by the court, a jury having been waived. The facts were found specially, and we think that the evidence was sufficient to justify the findings.

But there are two questions of law in the record, which demand our consideration.

1. A mill, which was lease-hold property, was destroyed by accidental fire, being, at the time it was burned, let to responsible parties, who, by the terms of their lease, were bound to repair, but who became insolvent, so that the money was not made upon their liability, though it was reduced to judgment. It is contended that the administrator ought to have kept the property insured, and that he is liable for having neglected to do so. No authority is cited for this proposition, and we know of none. What little there is in the books, so far as our search, and that of counsel, has extended, is the other way. *Williams on Exrs.* 1638; 2 Har. Dig. 2998. These works cite *Bailey v. Gould*, 4 Y. & Coll. 221.

But we think, with the judge who tried the case below, that the administrator ought to be held to adopt such precautions against loss of property by fire, as prudent men are, under similar circumstances, accustomed to exercise to indemnify themselves against the like casualty. This would be but reasonable care, and, ordinarily, an administrator is held to that. The decided weight of the evidence was that mill owners, in that region, were not generally in the habit of insuring, in consequence of the high rates of premium demanded.

2. Was the administrator, in this case, chargeable with the rents of the real estate, accrued during his administration? Ordinarily, he would not be, but here there was a will, and the question depends upon it.

The provisions of the will are as follows: The dwelling house and lot, (except that part of it occupied by a store, which stood thereon,) with certain specified village lots, were devised to the widow, who is plaintiff in this suit. Certain specific bequests were also made, and to the widow an annuity of \$500. The residue of the estate, "both real and personal," was given, in equal parts, to a nephew and sister of the testator. It was directed that the nephew,

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one *John J. Rubottom*, who was made an executor, (with two other persons,) should, with the counsel of his co-executors, continue the business of milling and merchandising, as the testator had conducted it, and had endeavored to instruct *John J.* The real estate, not specially devised to the widow, consisted of a house and lot used in connection with the mill, for a miller's dwelling, a ware house and a store house, with the ground upon which they stood, and which were used in conducting the mercantile and milling business, and, also, several tracts of farming lands.

The law is too well settled for controversy, that real estate, unless otherwise disposed of, goes to the heirs, and not to the executors, and that a mere power given to the executor to sell real estate, does not give him a right to the possession thereof; that to entitle him to such possession, the land, or its usufruct, must be expressly, or by necessary implication, given to him by the will. Such is not the testament in the case before us. A portion of the real estate was by it expressly given to the widow, and the *residue* of the estate, "both *real* and *personal*," subject to specific bequests, was disposed of to the nephew and sister of the testator, thus clearly indicating an expectation on his part, that it would not be necessary even to sell all the real estate. Except as to such of it as was necessary for the mercantile and milling operations, there is nothing whatever upon which to rest the implication that the testator intended that the executor should take possession of the real estate, or receive its rents and profits. It is true that the wife's annuity was a charge upon it, for the satisfaction of which it might be necessary to *sell* it, but the right to its possession and profits does not, by any means, result therefrom. *Clendenning v. Lanius*, 3 Ind. 441. It may fairly be implied, that *John J. Rubottom*, as executor, should use the store room, ware house and miller's dwelling, in conducting the milling and mercantile business, as he was by the will directed to do. He became executor, and did so until his resignation, when the appellee was

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appointed administrator, with the will annexed. This right, if implied, was incident to the authority to conduct the business directed. But, as we understand the will, that authority was personal to *John J. Rubottom*, ceasing when he ceased to be executor, and did not continue, as it would if given to the executors generally, in the hands of the administrator *de bonis non*. 2. G. & II. 489.

The judgment is affirmed, with costs.

N. B. Rairden, G. Holland and C. C. Binkley, for appellant.

J. D. Howland and L. Barbour, for appellee.

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SATISFACTION OF MUTUAL CLAIMS, NOT IN JUDGMENT.—Suit by A against B and C, upon a promissory note made by B. The complaint alleged that B, being insolvent, had, for the purpose of defrauding his creditors, assigned all of his notes and accounts to C, and among them a note made by A to him. Prayer for judgment against B, and that the assignment to C might be declared fraudulent, and the amount of plaintiff's indebtedness to B be allowed as a set-off on the note sued on. On the trial, it appeared that C was the attorney of B, and that the assignment of the note against A was in trust to collect the same, and apply the proceeds *pro rata* upon the domestic debts of B. None of the creditors had been consulted, and but one of them assented to the arrangement.

Held, that though the note against A, assigned by B to C, must be regarded as belonging in equity to B, yet A was not entitled, before both claims had passed into judgment, to obtain satisfaction of his debt to B, by applying it upon the claim sued upon, without proof of B's insolvency.

Held, also, that the rule in equity is, that such relief will not be granted, where the claims are wholly disconnected, unless there are some special circumstances, such as the insolvency or non-residence of the defendant.

APPEAL from the *Putnam* Common Pleas.

FRAZER, J.—The appellant sued *Walls* and *Eckels*, alleging in his complaint that he held, by indorsement, a note against *Walls* for \$1552 80, then due and unpaid; that *Walls* was insolvent; and that to defraud, hinder, and delay his creditors, *Walls* had combined with *Eckels*, and, without consideration, had in *December*, 1863, assigned and trans-

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ferred to the latter all his notes and accounts, amounting to \$7500, and, amongst others, a note against the plaintiff, which *Eckels* still held. Judgment was prayed against *Walls* for the amount of the first mentioned note; that the assignment of the note against the plaintiff to *Eckels* be declared void, and that a set-off be allowed, &c. Issue was taken upon the complaint by the general denial, upon which there was a finding and judgment against the defendant *Walls*, and in favor of the defendant *Eckels*. The court below having overruled a motion, by the plaintiff, for a new trial against *Eckels*, the plaintiff appeals to this court, and assigns that ruling for error.

It is claimed that, upon the evidence, the finding ought to have been against *Eckels*. It is to be regretted that, in a case of this importance, we are without any argument whatever on behalf of the appellees.

The principal facts alleged in the complaint, with a single exception, were clearly established by proof. The chief controversy being, as we suppose, whether the assignment to *Eckels* by *Walls* was, as to creditors, fraudulent and void. Upon that subject, the testimony of *Eckels* himself, who was a witness, was that he was the attorney of *Walls*; that *Walls* indorsed and delivered to *Eckels*, as his own attorney, in trust for creditors of *Walls*, notes and checks to the amount of about \$6200, nearly all of which was to go to certain non-resident creditors, specified amounts to each, if they would accept the same, which they afterward did, and the paper was accordingly delivered to them; that two notes against the plaintiff, one for \$1424, and the other for \$347 67, were to be collected by *Eckels*, and applied *pro rata* upon the *Indiana* debts of *Walls*, which amounted to about \$7800. No creditor was consulted about this arrangement, and but one of the *Indiana* creditors had ever assented to it. It was shown, also, that *Eckels* received for himself \$300, in part for a claim due him, and in part for professional services to be

rendered in litigation, which was anticipated in the matter. But the record does not show any proof of *Walls'* insolvency.

In the absence of all proof that *Walls* was, when the property was transferred, in embarrassed or failing circumstances, the act concerning voluntary assignments (1 G. & H. 114,) can have no application whatever to the present case. And inasmuch as there is a like absence of evidence tending to show that he has ever been insolvent, the entire question of fraud may be deemed disposed of, for we are not to assume, without evidence, that *Walls* has not sufficient property subject to execution, out of which the plaintiff can make his judgment.

That the transfer to *Eckels* is void as to creditors, and that the assets in his hands can be reached by the plaintiff, if he cannot otherwise obtain satisfaction of his claim, is clear enough; but that is not the question presented by the evidence. The question arising, if we treat, as we think we must, the note against the plaintiff, held by *Eckels*, as belonging in equity to *Walls*, is simply this: whether the plaintiff, without proof of *Walls'* insolvency, can thus obtain satisfaction of his own outstanding indebtedness, before both have passed into judgment? The appellant does not discuss this question, having overlooked the circumstance that his averment of insolvency is without proof.

After a somewhat careful examination, we have not found any case which would sustain an affirmative solution of the question. It will be remembered that we have no statute changing the law upon the subject, and the rule in equity seems to be, not to grant the relief where the demands are wholly disconnected, as in this case, unless there are some special circumstances, such as the insolvency or non-residence of the defendant, or other extraneous facts, to form the basis of equity jurisdiction. 2 Paige 581; 2 M'Cord's Ch. 184; 5 Mason 201; 2 Edw. 73; 7 Mon. 457; 1 *id.* 184; 2 J. J. Marsh. 365; 3 A. K. Marsh. 6. The rule of the civil law was otherwise, and it

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prevails in most of the countries of Continental Europe. The wonder is, that a jurisdiction so just should never have obtained in the courts of chancery, which have drawn so largely from that source.

The judgment is affirmed, with costs.

Williamson & Daggy, for appellant.

Eckels & Scott, for appellees.

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A conveyed to the *Cincinnati, New Castle & Michigan Railroad Company*, in May, 1853, a tract of land in the town of *Muncie*, to be paid for in the capital stock of the company. In his written proposition to the company, which was accepted, he reserved the right to use and occupy the premises until the road should be completed to the town of *Wabash*, but, by mistake, the reservation was not inserted in the deed. In August, of the same year, he also conveyed to the company the east half of the north-east quarter of section 21, in township 20, north, of range 10, east. In September, the railroad company executed to A and B a deed of trust, conveying to them the two tracts of land conveyed by A to the company, together with a large amount of other lands, to be held by them in trust, to secure the payment of \$75,000, for which the company had issued her bonds. By mistake, the eighty acre tract of land, conveyed by A to the company, was described in the deed of trust as the west half of the north-east quarter, &c. The bonds secured by the deed of trust had each of them a certificate attached, signed by the trustees, stating that the company had conveyed to them certain real estate to secure the payment of certain bonds, "of which the above obligation is one." The deed itself provided that the company should have the right to sell any part of the lands deeded, for not less than the appraised value mentioned in the deed, and that, upon the surrender to the trustees of an amount of the bonds equal to such appraised value, they should convey to the purchaser. The *Cincinnati, New Castle & Michigan Railroad Company* was afterward consolidated with other companies, and the new corporation took the name of the *Cincinnati & Chicago Railroad Company*. In January, 1857, A purchased of the consolidated company the eighty acre tract formerly conveyed by him to the old company, by surrendering \$8000 of the bonds secured by the deed of trust, and crediting himself with \$200 due for services as trustee, and, the mistake in the description being then

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first discovered, took a deed from the company, in whom the legal title was supposed to be by reason of the mistake. In *September*, 1857, A filed his complaint against the consolidated company, alleging a mistake in the deed made by him for the lot in *Muncie*, in the omission of the condition that he should retain possession until the road was completed to *Wabash*, and a decree was entered reforming the deed in that particular. Subsequently, C and D, who held all of the outstanding bonds secured by the deed of trust, amounting to \$15000, filed their bill for a foreclosure against the company, and A and B, the trustees named in the deed, and obtained a decree of foreclosure, and for the sale of all the lands described in the deed, "except such lands as had been purchased with bonds secured by the deed of trust." The mistake in the description of the eighty acre tract was carried into the decree and sheriff's advertisement, but, the error being discovered on the day of sale, the land was sold and conveyed by a correct description to C and D, as was also the lot in the town of *Muncie*. Suit by C and D against A, to recover the possession of the lands, and judgment of ouster against A. On the trial, A offered to prove that C and D had notice, at the time they purchased the bonds sued on, of his equity to have his deed for the town lot reformed.

Held, that the judgment was right as to the lot in *Muncie*, as C and D were not parties to the proceedings to reform the deed of A to the company, and, consequently, were not bound thereby.

Held, also, that as the bonds had been passed by the company, in good faith, and in the usual course of business, their value could not be affected in the hands of a subsequent holder, by notice to him of an outstanding equity in the trustee who had certified the title of the mortgaged lands.

Held, also, that in all cases of mistakes in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors, or purchasers from them with notice of the facts.

Held, also, that where more than one obligation is secured by a mortgage, each is considered a separate mortgage, and the assignment of one or more of such obligations will carry with it so much of the mortgage, and such assignee, if the assignment is made in good faith, and without notice, is regarded as a purchaser, and protected from an outstanding equity.

Held, also, that the possession of A of the town property was not, under the circumstances, constructive notice to the original purchaser of the bonds from the company of A's equity. The purchaser had a right to rest upon the certificate made by A as trustee.

Held, also, that the sale of the eighty acre tract of land by the company to A, was in substantial compliance with the terms of the deed of trust, by which the company reserved the right to sell any of the lands, on the surrender of an amount of the bonds equal to the appraised value of the lands sold.

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Held, also, that if the fact that A paid \$200 of the appraised value in a claim for services as trustee, and not in bonds, rendered the sale to him voidable, it could only be avoided by a direct proceeding to set aside the sale, and the repayment to him of the purchase money and interest.

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APPEAL from the *Delaware* Circuit Court.

GREGORY, J.—*Henry Rowe and John Bates* sued the *Cincinnati & Chicago Railroad Company* and *Thomas J. Sample*, in the court below, for the possession of real estate, and to correct an alleged mistake in the description of a portion thereof, in a deed of conveyance from the latter to the *Cincinnati, New Castle & Michigan Railroad Company*. On the 20th of *May*, 1853, *Sample* conveyed by deed in fee, to the latter company, one-third of an acre of ground in the town of *Muncie*, together with the office adjoining, described by metes and bounds; and, on the 11th of *August* following, in like manner, the former conveyed to the latter, among other real estate, the east half of the north-east quarter of section 21, in township 20, north, of range 10, east. On the 1st of *September*, of that year, the railroad company executed a deed of trust, in the nature of a mortgage, by which she conveyed to *Sample*, and one *Thomas Corwin*, some forty-one different tracts of land, with an estimated value on each, to be held by them as trustees, to secure the payment of a loan of \$75,000, with the interest thereon, for which the railroad company issued her bonds in the sum of \$1000 each, with interest warrants attached. Among the real estate conveyed by this deed of trust, is the town property conveyed by *Sample* to the railroad company, and the following: "Also, the west half of the north-east quarter of section 21, in town 20, north, of range 10, east, containing eighty acres, and deeded by *Thomas J. Sample* to the company, appraised at \$3200." The east, and not the west half, was intended, but was, by mistake, described as the west half.

The following stipulation is contained in the deed of trust: "And it is hereby expressly agreed and understood,

that the said party of the first part reserves the right to sell any portion of the property herein specified, at a price not less than the sum herein named as the appraised value thereof, and a proportionate price for any portion of any of the said several pieces of property; and whenever the said party of the first part, having made such sale, shall purchase and surrender to the said parties of the second part, or their successors in said trust, to be cancelled, an amount of the bonds herein specified and designated to be secured by this deed of trust, equal to the appraised value of any portion of said property, as herein specified, or of a proportionate part of the appraised value of any one of said several pieces of property, then the said party of the second part, or their successors in said trust, shall execute and deliver to such person or persons as the said party of the first part shall designate, a deed in fee simple for such portion of the said property."

The *Cincinnati, New Castle & Michigan Railroad Company* was afterward consolidated with the *Cincinnati, Cambridge & Chicago Short Line Railway Company* and the *Cincinnati, Logansport and Chicago Railway Company*, and the companies thus consolidating assumed the corporate name of the *Cincinnati & Chicago Railroad Company*. This company, afterward, having acquired the title to the eighty acres of land above described, by virtue of the consolidation, sold the same to *Sample* for \$3200, which was paid by him by the surrender of three bonds, of \$1000 each, secured by the deed of trust, and \$200 to be credited to the company, on the claim of *Sample* for his compensation for services as trustee. When the deed was being executed to *Sample*, the mistake in the description of the land was, for the first time, discovered. Under the impression that the legal title was still in the railroad company, and not in the trustees, the former, at the instance and request of the latter, on the 10th of *January*, 1857, conveyed to *Charles P. Sample*, (a son of the appellant,) who quit-claimed to his father, on the 22d of *April*, 1858. The deed of *January*

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10, 1857, was duly recorded in *February*, 1857, and the other in *April*, 1858. The bonds secured by the deed of trust bear date the 1st of *September*, 1853. On the 19th of *May*, 1853, the appellant submitted his proposition, in writing, to the railroad company, for the sale of the property in *Muncie*, as follows: "I hereby propose to sell and convey to the *Cincinnati, New Castle & Michigan Railroad Company*, the following described real estate, to-wit: (here follows the description), for the sum of \$1600, to be paid for in the capital stock of the company, at par. And, if the board of directors of said company shall accept this proposition within ten days from this date, the same shall be binding on me, and I agree to convey said property to said company by a general warranty deed, clear and free from all incumbrances, so soon as a certificate of the stock is executed to me; allowing me to retain possession of said property, if I do not remove to *Cambridge*, until the railroad is completed to *Wabash*, if I see proper, and no interest allowed on the stock until I vacate it. And when I give possession, the company pays me interest at the rate of two shares of stock per year. I am to have permission to take up and remove what plants and shrubbery I choose, whilst I occupy it." [Signed.]

THOMAS J. SAMPLE.

The railroad company accepted this proposition, but, by mistake, these conditions were not incorporated into the deed, which was executed the next day. On the 14th of *September*, 1857, the appellant filed in the *Delaware* Circuit Court, his complaint against the *Cincinnati & Chicago Railroad Company*, to reform the deed executed by him to the *Cincinnati, New Castle & Michigan Railroad Company*, in pursuance of the proposition. The railroad company entered an appearance, waived process, and admitted the allegations in the complaint; and the court decreed that the deed be corrected so as to contain the matter omitted.

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There was attached to each of the bonds issued by the railroad company, secured by the deed of trust, the following certificate:

"We hereby certify that the *Cincinnati, New Castle & Michigan Railroad Company* have conveyed to us by deed, bearing date the 1st day of *September*, 1853, certain real estate in trust, for the use of the holders of their obligations of similar tenor as the above, issued and to be issued, to an amount not exceeding \$75000, and which we have caused to be recorded in the several counties in the state of *Indiana* in which the said real estate is situate; and we further certify that the above is one of the obligations referred to in, and secured by, said deed.

[Signed.]

T. J. SAMPLE, } Trustees,
THOS. CORWIN, }

The appellee *Henry Rowe*, on the 4th of *June*, 1857, filed his complaint in the *Delaware* Circuit Court, against the *Cincinnati & Chicago Railroad Company*, *Thomas J. Sample* and *Thomas Corwin*, alleging that he was the holder and owner of a certain amount of the bonds and interest warrants secured by the deed of trust, averring their non-payment, and praying a foreclosure of the deed of trust as a mortgage. On the 13th of *September*, 1858, *John Bates* was made a co-plaintiff, by the consent of *Rowe*, alleging that he was the holder and owner of certain other of the bonds and interest warrants secured by the deed of trust, averring their non-payment, and praying a foreclosure.

The railroad company answered the complaint; *Sample* did not answer. A trial was had, and the court found for the plaintiff *Rowe*, \$3,850 50, and for the plaintiff *Bates*, \$12,050. The court further found specially, "that the several bonds mentioned by the plaintiff *Henry Rowe*, in his complaint, and the several bonds mentioned by the plaintiff *John Bates*, in his complaint, were executed by the defendant, the *Cincinnati, New Castle & Michigan Rail-*

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road Company, before the act of consolidation mentioned in the pleading, that the same were made and signed at *Muncie, Indiana*, where the office of the company was kept; that the same were taken to the city of *New York*, and offered for sale, but without success, and afterward were returned to, and sold at, the city of *Cincinnati*, in the state of *Ohio*, to *De Graff*, in payment for work done by him on defendant's road, in the state of *Indiana*." A decree of foreclosure was had against the defendants, excepting "*such lands as had been purchased with bonds secured by the deed of trust*."

The eighty acre tract was mis-described in the complaint, decree and sheriff's advertisement, but the sheriff, on the day of sale, discovered the mistake, and sold and conveyed to the appellees the right tract.

The town property deeded by *Sample* to the railroad company was sold under this decree to the appellees; and the second paragraph of the complaint is for the recovery of the possession thereof from the appellant.

There are no averments in the complaint in the foreclosure case, that could have formed the basis of a decree against *Sample* to set aside his purchase of the eighty acre tract of land of the railroad company. The appellees did not attempt to show what lands had been sold under the stipulation in the deed of trust, but contented themselves with protecting the rights of purchasers thereof, by excepting such sales from the operation of the decree of foreclosure, although they knew, when they filed their complaint, that *Sample* had made the purchase with the bonds secured by the mortgage. The decree of foreclosure was not rendered until some four years after *Sample* made his purchase, and the recording of the deeds under which he claims title. The record shows that the appellees became the purchasers at the sheriff's sale, under their decree, of the entire real estate embraced in the deed of trust, worth some *ninety thousand dollars*, over and above the eighty acre tract involved in the case in judgment.

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There were no outstanding unpaid bonds secured by the deed of trust, other than those owned and held by the appellees. *Sample* offered to prove, on the trial, that *Rowe* and *Bates*, at the time they became the holders of the bonds in suit, had notice of his claim to the possession of the house and lot in *Muncie*.

The court below found for the appellees, and rendered judgment over a motion for a new trial. The evidence is in the record.

We think the finding of the court, as to the house and lot in *Muncie*, is right. The appellees were not parties to the suit to reform the deed from *Sample* to the railroad company, and cannot be bound by the decree rendered therein. Under the facts disclosed by the record, *Sample* had no right, as against *Rowe* and *Bates*, to correct the mistake in his deed, by the incorporation therein of the omitted condition, that he was to retain the possession of the property until the road was completed to *Wabash*.

The bonds held by the appellees had been passed by the railroad company, in good faith, in the usual course of business, to *De Graff*, for work done by him on the road in *Indiana*, and their value could not be impaired by notice to a subsequent purchaser thereof, of an out-standing equity, in the hands of the trustee who had certified the title of the mortgage lands, for the purpose of giving them currency. The rule seems to be, that in all cases of mistake in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors, or purchasers from them with notice of the facts. *White et al. v. Wilson et al.*, 6 Blackf. 448, and the authorities there cited.

Where more than one obligation is secured by a mortgage, each is considered a separate mortgage, and the assignment of one or more of such obligations will carry with it so much of the mortgage. *Crouse v. Coleman*, 19 Ind. 80.;

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Murdock v. Ford, 17 *id.* 52; *Harris v. Harlan*, 14 *id.* 489. And such an assignee is regarded as a purchaser, and, if in good faith, without notice, he is protected from an out-standing equity. The possession of *Sample* was not, under the circumstances of this case, constructive notice to *De Graff* of his equity: *De Graff* had a right to rest upon *Sample's* certificate.

We think the finding of the court below, as to the eighty acre tract, is wrong.

The power of sale reserved by the railroad company, is not the ordinary power of a trustee to deal with the property of the *cestui que trust*. The clause for the protection of the holders of the bonds secured by the deed of trust was, that an amount of such bonds equal to the appraised value of the property sold should be surrendered and cancelled; when this was done, all was done in which the *cestui que trust* had any interest whatever. The omission of this was the only thing of which they had a right to complain; a sale for a greater sum than the appraised value would have inured to the benefit of the railroad company, and not to the bond-holders. It was a reservation of a right, as well as of a power. The railroad company had the uncontrolled power to sell to whom she pleased; she could sell to the trustee as well as to a stranger. The trustee, having the legal title, was the proper person to make the conveyance, but, in the case in judgment, the legal title was still in the railroad company, by reason of the mistake in the description of the land in question, with the right of having the mistake corrected in a court of chancery. The mode adopted of making the conveyance was a substantial compliance with the terms of the power. The trustees, and those claiming under them, are estopped from claiming against the deed of the railroad company, and the bond-holders had no right to complain, because they got all that was stipulated in their favor, the surrender and cancellation of the three \$1000 bonds, and the payment of \$200 of the expenses of the trust. But

it is objected that the *two hundred dollars* was the private claim of the trustee, and that that made the sale to *Sample* void. We do not think so. Admitting, for the sake of argument, that this would render the sale voidable, yet the sale to *Sample* could only be set aside by reimbursing him his money paid, interest and improvements, if any were made by him after his purchase. That question could not be settled in this collateral manner, but in a direct proceeding to set aside the sale, in which all the equitable considerations would arise, growing out of the fact that the appellees have *ninety thousand dollars* of the mortgage property to pay some *sixteen thousand*, and their acts of acquiescence for an unreasonable length of time.

We think that there is no such reference to the deed of *Sample* to the railroad company, as to make the description of the land in question in that deed, a part of the description of the land in the deed from the railroad company to the trustees. The phrase, "deeded by *Thomas J. Sample* to the company," in the latter deed, is the statement of a fact, and not a reference to a deed for greater certainty, for it will be noticed, that in the description of each of the forty-one tracts of land contained in the deed of trust, it is stated by whom each was deeded, with the valuation thereof. We, however, do not consider this question of much importance in this case, as the sale of the land, and the surrender of the bonds, vested in *Sample* the equity in the land, which, under the code, would protect his possession.

As the land was misdescribed in the decree of foreclosure, that decree cannot affect the rights of *Sample*; but independent of this, we think the saving clause in the decree sufficient to embrace the sale to him of the eighty acre tract in controversy.

By statute, under the general denial, every defence, both legal and equitable, can be given in evidence, therefore, the only question properly before us is, did the court below err in overruling the motion for a new trial? There are a

O'Conner v. O'Conner.

number of questions argued by counsel that we do not decide, because they are not properly in the record.

The judgment of the court below, as to the east half of the north-east quarter of section 21, in township 20, north, of range 10, east, is reversed, and as to the residue of the real estate described in the complaint, is affirmed. The cause is remanded to said court for a new trial. Costs against the appellees.

W. March and T. J. Sample, for appellant.

J. Smith and Shipley & Kilgore, for appellees.

O'CONNER v. O'CONNER.

SLANDER.—*Mitior sensus.*—The doctrine that, in actions of slander, the words spoken are to be construed in *mitiori sensu*, has been exploded, and the rule now is, that such words are to be understood according to their plain and natural import, and according to the ideas they are calculated to convey to those to whom they are addressed.

SAME.—In a complaint for slander, the words charged were, "they have killed my son, and are trying to cheat me out of my land," the death of the son being averred, and the words being charged to have been spoken of and concerning the plaintiff.

Held, that the words were actionable.

APPEAL from the *Hendricks* Circuit Court.

GREGORY, J. — Suit by the appellant against the appellee, in slander. The complaint contains four paragraphs, a demurrer to each of which was sustained by the court below, and final judgment thereon.

The ruling on the first paragraph was correct, for the reason that it is alleged that the slanderous words charged were spoken "of and concerning the brothers (*Patrick* and *Michael Clune*) of said plaintiff;" and this averment is not contradicted by the other averments, except by innuendo, which cannot control a direct and positive allegation.

O'Conner v. O'Conner.

The words charged in the second paragraph are: "*They have killed my son, and are trying to cheat me out of my land.*" It is averred, that the defendant meant, and intended to charge, that the plaintiff, together with her brothers, and the physician who attended one *John O'Conner*, the husband of the plaintiff, in his last sickness, had killed and murdered the said *John*, and was trying to cheat and defraud the defendant out of his land, and he (the defendant) was so understood to mean and charge by the persons then present.

The slanderous words in the third paragraph are: "*In room of her trying to help him, she seemed to do all she could to hurry him out of the world.*" It is alleged that the defendant thereby charged that the plaintiff had killed and murdered her husband, *John O'Conner*, who had before that time departed this life.

The fourth paragraph charges a conversation between the defendant and one *Peleg Thompson*, of and concerning the death of *John O'Conner*, and of and concerning the plaintiff and others, in which *Thompson* said, "*there was something wrong; there must be a nigger in the fence about that matter;*" to which defendant replied, "*they have killed my son, and are trying to wrong me out of my property;*" to which *Thompson* rejoined, "*that was pretty hard;*" to which the defendant responded, "*it is hard; John, my son, was sick, in room of her doing anything to help him, she seemed more inclined to do things to help him out of the way. My daughter-in-law talks as though I have no right here; I have come to get your name; I may have to call you up as a witness sometime. Mr. and Mrs. Thompson, they have killed my son, and now they are trying to wrong me out of my rights; it seems to me, that instead of their doing him any good, they were trying to help him out of the way.*" It is averred that the defendant thereby charged, that the plaintiff, together with others, had killed and murdered *John O'Conner*, his son, and the husband of the plaintiff, and was so understood to mean by the persons then present.

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The complaint contains the proper allegations, by *innuendo*, of the persons meant by the defendant in the words spoken by him.

The doctrine of construing words in *mitiori sensu* has been exploded, and a more rational rule now prevails, that words are to be understood according to their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed. *Mr. Starkie*, in his valuable treatise on slander, states the rule as follows: "Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by the whole circumstances of the case. It is the province of the jury, where doubts arise, to decide whether the words were used maliciously, and with a view to defame, such being matter of fact, to be collected from all concomitant circumstances, and for the court to determine whether such words, taken in the malicious sense imputed to them, can, alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action." *Demarest v. Haring*, 6 Cowen 76; *Rodgers v. Lacey*, 28 Ind. 507; *Harrison v. Findley*, *id.* 265. In this latter case, the authorities are cited, showing what words will be actionable, imputing the crime of murder or manslaughter. The cases of *Peake v. Oldham*, Cowper's Rep. 275, and *Ford v. Pinrooe*, 5 Dowling & Ryland, 287, (16 Eng. Com Law, 284,) are very much in point in the case in judgment.

In *Button v. Hayward et ux.*, (8 Mod. 24,) the words spoken by the wife were: "George Button (the plaintiff) is the man who killed my husband;" her first husband being dead. After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable for the uncertainty of the word *killing*, for it might be justifiable, or in his own defense, or *per infortunium*, and shall not be presumed felonious, and so made actionable by intendment, for it is a maxim that words shall be taken in *mitiori sensu*. But it was said by PRATT, C. J., "There can

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be no question but, at this day, these words are actionable. In former times, words were construed in *mitiori sensu*, to avoid vexatious actions, which were then too frequent; but now, *distinguenda sunt tempora*, and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent. *We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them in mitiori sensu; but we will never make any exposition against the plain natural import of the words.* The word *killing* signifies a voluntary and unlawful killing, and is actionable." 1 Starkie on Slander 51. The case of *Shinloub v. Ammerman*, 7 Ind. 347, cited by counsel for appellee, is not in point. It is not *perjury* to swear to a lie, but an unlawful killing is murder or manslaughter. In the case of *Drummond v. Leslie*, 5 Blackf. 458, this court held, that although the words laid in a declaration of slander do not contain a directly affirmative charge that the plaintiff had committed *forgery*, yet, if they were calculated to induce the hearers to *suspect* that the plaintiff had committed it, they are actionable.

In the light of these authorities, the circuit court erred in sustaining the demurrers to the second, third and fourth paragraphs of the complaint.

The judgment is reversed, and the cause remanded to said court, with directions to overrule the demurrers to the second, third and fourth paragraphs of the complaint, and for further proceedings in accordance with this opinion.

Costs against the appellee.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

The Indianapolis and Cincinnati Railroad Company v. Guard.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
GUARD.

TWO CASES.

RAILROADS.—FENCES.—Railroad companies are required by statute to fence their roads, and, construing this law as a police regulation, for the safety of the public, the fact that a railroad runs along side of a public highway would seem to require peculiar care on the part of the company in complying with the law.

APPEAL from the *Dearborn* Common Pleas.

RAY, J.—The questions presented by these records are identical. The pleas in the one case are but copies of the papers filed in the other, differing alone in the date of the occurrence, and the value of the animals killed. The rulings of the court were the same in both cases. A statement of the pleadings, the judgment and the facts in the one case will therefore be sufficient.

The appellee instituted a suit for the value of an animal killed by the locomotive of the appellant, where the railroad was not fenced. The defendant answered by one paragraph, to which a demurrer was sustained. Defendant then filed three additional paragraphs to his answer, to the third of which a demurrer was sustained. Trial upon the other issues, and judgment for the plaintiff.

The complaint charges that said railroad company, on the 18th day of *February*, 1864, was running a train of cars on said railroad, in *Dearborn* county, *Indiana*; that said locomotive and train struck and ran over and killed a brown mule, belonging to said plaintiff, of the value of \$300; and that said railroad was not, at said time and place where said mule was killed, fenced in by said defendant, in manner and form as in the statute provided.

The first and third paragraphs of the defendant's answer are substantially the same; the third being intended to be a little more specific, and it will, therefore, only be noticed. This paragraph alleges, "that said mule was killed on

the track of said railroad, between *Lawrenceburgh* and the line dividing the states of *Indiana* and *Ohio*, and that, at the time of the construction of said railroad, the said defendant acquired the right of way for said road over a strip of ground one hundred feet wide, from *Lawrenceburgh* to the state line aforesaid, and was still in possession, and had control of the same at the time of killing said mule; that there was a state turnpike road, or public highway, along the west side of said strip of ground, or right of way, adjoining thereto; that at the time of killing said mule, said plaintiff suffered and permitted said mule to run at large upon said public highway, well knowing that said public highway adjoined said right of way of the said defendant; that said mule strayed from said highway upon said railroad track, and was killed; and that, at the time of the killing, said locomotive and train were run and conducted with prudence and care.

The first act of the legislature on the subject of railroad companies fencing their roads, will be found in the laws of 1853, page 113; the next, amendatory of the former, will be found in the laws of 1859, page 105, and the last, which repeals all former laws, will be found in the laws of 1863, page 25.

This court, in the cases of *The M. & I. R. R. Co. v. Whiteneck*, 8 Ind. 217, *The I. & C. R. R. Co. v. Townsend*, 10 Ind. 38, *The New Albany & Salem R. R. Co. v. Tilton*, 12 Ind. 8, and *Same v. Maiden*, *id.* 10, held "that the act of March 1, 1853, is in the nature of a police regulation, designed to promote the security of persons and property passing over the road, and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon land adjoining the road, he may recover, if the company has failed to comply with the requirements of the statute."

The legislature, with this construction given to the act by repeated decisions of this court before it, has carefully

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avoided, in the amendments it has made to the act, any material change that could relieve it from the force of these rulings. We must regard the legislation upon this act, as fully adopting the construction placed upon it, and whatever views we may entertain as to the proper interpretation of the language of the statute, still, after such repeated and uniform construction has been given to it, and the makers of the law have so plainly acquiesced in this construction, we do not feel at liberty to discuss its correctness. The cases under consideration present no new points for decision. The railroad company was bound to fence its road, and the fact that it ran along side of a public highway, construing the law as a police regulation for the safety of the public, would seem, in the case at bar, to require particular care in complying with the provisions of the act.

The judgments are affirmed, with 3 per cent. damages in each case, and costs.

D. S. Major, for appellant.

W. S. Holman, for appellee.

NAVE, Administrator of LOVELL, v. HADLEY.

APPEAL from the *Hendricks* Common Pleas.

FRAZER, J.—*Nave*, administrator of *Lovell*, sued *Hadley*, alleging in his complaint that the intestate, for the purpose of hindering and defrauding creditors, delivered three colts to *Hadley*; that *Hadley* had possession of the property at the death of the intestate, and had since sold a part and kept the balance, and on demand of the administrator refused to deliver it to him, &c. The answer was: 1. A general denial. 2. That the colts were placed in his possession by *Lovell*, as the property of his infant sons, to

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rear, and until the boys should arrive at sufficient age to manage them, the boys to pay reasonably for the defendant's expense and trouble; that the boys enlisted in the army, where they still remained, and had been for about three years; that one of the animals yet remained in the defendant's possession, and the other two had been disposed of, and the proceeds and the animal remaining, were held subject to the claim of the boys, and of the amount due the defendant for keeping the same. The reply to the second paragraph of the answer was: 1. A general denial. 2. That the defendant received the colts to conceal them from levy by execution against *Lovell*, and had ever since so concealed them, with the intent to defraud *Lovell's* creditors. There was a trial by the court, and a finding and judgment for the defendant.

We are pressed by the appellant, with much earnestness, to reverse the judgment, upon the ground that the finding of the court below was against the evidence, and inasmuch as no other question is presented, we forbear to consider any other.

We cannot reverse the judgment for the reason presented. There was evidence tending to show that the colts were the property of *Lovell's* boys, and this was not contradicted. They were delivered to the defendant as being their property, and *Lovell*, before becoming embarrassed, had stated that they belonged to the boys. The rule governing appellate courts in such cases is too well settled to warrant our interference under such circumstances.

The judgment is affirmed, with costs.

C. C. Nave and *J. Witherow*, for appellant.

L. M. Campbell, for appellee.

Wood v. Wallace and Another.

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WOOD v. WALLACE and Anther.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—One *Coffman* was indebted to *Wood*, and to pay his indebtedness, the former assigned to the latter, without writing, so much of a judgment against one *Gaston* as would pay the same. The judgment was, by *Coffin*, placed in the control and under the management of *Wood*, who proceeded to issue execution thereon, and caused the money to be made by the sheriff, who paid it over to *Wallace*, the clerk of the court in which the judgment was rendered. In the meantime, *Coffin* died, and *Sullivan*, his administrator, refuses to recognize the assignment, and insists on the payment of the proceeds of the judgment to him. A demand was made on *Wallace*, at the clerk's office, by *Wood*, for the sum to which he is entitled under his assignment.

We think that this was, in equity, a good assignment to *Wood*, and vested in him the right to demand and receive from *Wallace* the money so due him. 2 Story's Eq. Jur. §§ 1044, 1047, and the authorities there cited. The case in judgment is clearly distinguishable from the case of *Slaughter et al. v. The State ex rel. Chase, Administrator of Rogers*, 2 Ind. 220. Under the statute then in force, *Slaughter* could not have been the assignee of the judgment on his docket as a justice of the peace. R. S. 1843, p. 915, § 318. But we are not prepared to give our assent to the doctrine, that a power, coupled with an interest, is revoked by the death of the person granting it.

The judgment is reversed, and the cause remanded to the court below, with directions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion. Costs against the appellees.

J. L. Ketcham, for appellant.

A. G. Porter and *W. P. Fishback*, for appellees.

Gregg v. Wilson, Administrator of Matlock.

GREGG v. WILSON, Administrator of MATLOCK.

APPEAL from the *Hendricks* Common Pleas.

FRAZER, J. — This was an application by a creditor, under the statute, to remove an administrator. 2 G. & H. 491. The court below found in favor of the administrator. The evidence is in the record, and the only question presented for our consideration is, whether the finding and judgment were correct.

The causes alleged in the written application are these: first, failure to make and return an inventory of the personal estate; second, fraudulently omitting to embrace in the inventory certain claims due the deceased; third, failure to collect, and conspiring to prevent the collection of, certain monies due the deceased; fourth, incompetency.

The evidence utterly fails to support any of the foregoing allegations. An inventory seems to have been made, but whether it was ever filed in the clerk's office, or not, does not appear; if so filed, it was not put in evidence, and, therefore, we cannot know whether or not it omitted the things alleged. This disposes of the first and second causes. The third was not sufficiently sustained. The charge of incompetency was supported merely by evidence that the administrator could neither read nor write. These qualifications would be very useful, but we cannot deem them absolutely essential. Such persons often possess, nevertheless, very considerable business capacity. As a general rule, however, it might be better if those wholly uneducated, were not appointed to such positions of trust and responsibility.

The judgment is affirmed, with costs.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

Bray v. Hussey.

BRAY v. HUSSEY.

PLEADING.—COPY OF WRITTEN INSTRUMENT.—In an action to set aside a conveyance of real estate, as fraudulent, and subject the land to the payment of a judgment, the fraud, and not the judgment, is the foundation of the action, and a copy of the record of the judgment need not be filed with the complaint.

JURISDICTION.—TITLE TO REAL ESTATE.—The circuit court has, by statute, exclusive jurisdiction of all cases where the title to real estate is in issue, and, hence, an action to set aside a fraudulent conveyance, and subject land to the satisfaction of a judgment rendered by the court of common pleas, must be brought in the circuit court.

FRAUD.—A took a conveyance of lands from his brother-in-law, B, for a consideration equal to only one-half of their value, and was informed, at the time, of the intention of B to avoid the payment of a debt then in suit, and upon which judgment was afterward recovered.

Held, that the transaction must be regarded as fraudulent.

APPEAL from the *Hendricks* Circuit Court.

FRAZER, J.—This was a suit by the appellee to set aside, as fraudulent, a conveyance of a tract of land, made by one *Roberts* to the appellant, and to subject the same to sale on execution to satisfy a judgment in favor of the appellee against *Roberts*, rendered in the *Hendricks* Common Pleas.

The first question presented is, whether the complaint should have exhibited a copy of the record of the judgment. We think not. The foundation of the suit was the fraud alleged in the conveyance to *Bray*, and the statute requires the written instrument to be exhibited with the complaint only when the complaint is founded upon it. 2 G. & H., § 78, p. 104.

It is urged that inasmuch as the judgment sought to be satisfied out of the lands was rendered in the common pleas, that court alone had jurisdiction of this cause. The statute, (2 G. & H., § 7, p. 21,) and sundry decisions of this court, which will be noticed, are relied upon as sustaining this proposition. The enactment is, that "in all suits and proceedings in which the circuit and common pleas courts shall have concurrent jurisdiction, the court which shall

first take cognizance thereof shall retain such cognizance exclusively, while the same may be pending in such court." This act was passed on the 14th of *May*, 1852. On the 1st day of *June*, of the same year, an act was passed conferring upon the circuit court exclusive jurisdiction of all cases where the title to real estate shall *be in issue*, (2 G. & H., § 5, p. 6); and in 1859, a mode was provided by which all such cases might be procured to be transferred from the common pleas to the circuit court. 2 G. & H., § 11, p. 22. The cases cited on behalf of the appellant (*Ind. & Ills. R. R. Co. v. Williams*, 22 Ind. 198, and *Coon v. Cook*, 6 *id.* 268,) did not involve the question now under consideration. The first mentioned case merely ruled that the common pleas could not enjoin the execution of final process issued out of the circuit court. In *Coon v. Cook*, it was held, that where land of an infant had been sold by a guardian, under an order of the probate court, a bill in chancery would not lie in the circuit court, on behalf of the purchaser, to compel a specific performance of the contract. The reason upon which these cases rest is, that each court had jurisdiction of the original cause, and also jurisdiction to grant the relief claimed by the subsequent suits, and, hence, that the statute (2 G. & H., § 7, p. 21,) was applicable. We need not, therefore, examine these cases further.

The case before us is one in which the title to lands is in issue, and, indeed, that issue constitutes the sole subject of controversy. It is not sought to interfere with the process of the common pleas, but to subject property to the satisfaction of its judgment. The subject matter is one which the legislature has chosen to withhold from the jurisdiction of the common pleas. It does not, by law, possess faculties enabling it to try the issue. The circuit court has exclusive jurisdiction by the positive terms of the statute, and we cannot, surely, deny that jurisdiction. We do not regard the two statutes (2 G. & H., § 7, p. 21, and *id.*, § 5, p. 6,) as being in conflict, as they apply to the case before us; but if they are, then the act of *June 1* must be held, so far, to repeal that of *May 14*, and, in either

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event, we would be conducted to the same result in the present case, which is, that the circuit court had jurisdiction of the cause.

The second paragraph of *Bray's* answer averred that he purchased the land of the judgment debtor, in good faith, for the sole purpose of obtaining thereby satisfaction of certain debts due him, and to indemnify himself against the loss of certain sums for which he was the debtor's surety, and denied all fraudulent purpose or intention in making the purchase. The plaintiff, *Hussey*, in his reply, admitted that *Bray* purchased for the purposes alleged in the second paragraph of the answer, and denied everything else alleged in that paragraph. The weight of the evidence disclosed that the land, subject to incumbrances which were upon it, was worth about \$600; it was purchased by *Bray* for \$340 25, being a little over one-half its value; he was a brother-in-law of *Roberts*, knew that the suit was pending which resulted in the judgment in favor of *Hussey*, and was told by *Roberts* that he did not intend to pay any judgment that *Hussey* might obtain. To take the conveyance under such circumstances, and with such notice of the purposes of *Roberts*, and when the land was sufficient in value to pay him for all his liabilities on account of *Roberts*, and also to satisfy a large part of *Hussey's* claim, was to enter into a transaction which cannot receive the sanction of any court. The question in issue by the pleadings was as to his intent in taking the conveyance, and we cannot, upon this evidence, say that the finding of the court below was not right. The decree directed the sale of the land, subject to incumbrances; that the proceeds be applied first to the payment of the sums for which *Bray* was liable as the surety of *Roberts*, and the balance upon *Hussey's* judgment. We cannot conceive how, under the evidence, a result more favorable to *Bray* could be expected were we to direct a new trial.

The judgment is affirmed, with costs.

C. C. Nave, for appellant.

P. S. Kennedy, for appellee.

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SOMERS and Another v. PUMPHREY and Others.

DEED OF INSANE PERSON.—The deed of a person of unsound mind, not under guardianship, conveys a seisin to the grantee; such deed being voidable only, and not void. Page 234.

WEAKNESS OF MIND.—Mere weakness of mind is not idiocy or insanity, nor does it amount to unsoundness of mind, within the meaning of the law, and such weakness is not enough, of itself, to avoid a deed. Page 235.

FRAUD.—A deed procured by the fraud of the grantee is not void, but voidable only, and conveys a seisin, which, in the hands of an innocent purchaser, without notice, may become a good title. Page 236.

INSTRUCTIONS.—It is error for the court to give to the jury instructions which are inconsistent with each other, and which leave the jury in doubt which to believe. Page 237.

INSANE PERSONS—CONTRACTS OF.—The deed of a person of unsound mind may be avoided by the grantor himself, or his legal representatives, though the estate may have passed into the hands of a *bona fide* purchaser for a valuable consideration. Page 238.

DEED—DELIVERY OF.—Ordinarily, the question as to the delivery of a deed is one of fact, to be determined by the jury, but it may arise in a form to present only a question of law for the court, or it may present a mixed question of law and fact, in which case the jury determines the facts, and the court the law arising upon the facts as proved. Page 239.

SAME.—The law does not prescribe any particular form of words or actions as necessary to constitute a delivery. Anything done by the grantor, from which it is apparent that a delivery is thereby intended, either by words or acts, or both combined, is sufficient. Page 239.

SAME.—An actual delivery by the husband to the grantee, of a deed executed by the husband and wife, of the wife's land, will, in the absence of fraud, be deemed a delivery by the wife also. Page 240.

SAME.—LEAVING DEED FOR RECORD.—The leaving of a deed for record at the recorder's office, by the grantor, is at least a *prima facie* delivery to the grantee; such act being regarded by the law as an unconditional delivery to a third person for the use of the grantee. Page 243.

IMBECILITY.—Imbecility of mind is not sufficient to set aside a contract, where there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. Page 246.

APPEAL from the *Franklin* Circuit Court

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139	74
24	231
142	374
142	536
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144	195
145	101
24	231
154	373
155	500
24	231
162	164

Somers and Another v. Pumphrey and Others.

ELLIOTT, C. J.—On the 19th of *June*, 1844, *Silas Pumphrey*, being seized of the north-west quarter of section 8, in township 18, in range 13, east, situate in *Fayette* county, *Indiana*, conveyed the same by deed, in fee, to his daughters, *Elizabeth Pumphrey* and *Jane Pumphrey*, jointly; in consideration of which the said *Elizabeth* and *Jane* executed to him their joint note for the sum of \$1200.

In the year 1845, *Elizabeth Pumphrey* intermarried with *Golvin Somers*, sen. Afterward, in 1846, *Silas Pumphrey* demanded of *Golvin Somers*, and his wife *Elizabeth*, payment of one-half of the note executed to him by the said *Elizabeth* and *Jane* for \$1200. *Golvin Somers*, the husband, paid the \$600 to *Pumphrey*. *Elizabeth* brought no other estate to her husband than her interest in the land conveyed to her by her father, and for the purpose of re-imbursing him the \$600, paid on the note to her father, on the 15th of *June*, 1846, for the purpose of having her interest in the land vested in her husband, she joined with him in a deed conveying her interest, in fee, to one *John Stineman*, who, on the next day, re-conveyed the same, by deed, to the said *Golvin Somers*. Both of these deeds acknowledge a valuable consideration, but, in truth, none was paid on either side. They were regularly acknowledged before a justice of the peace, and recorded in the recorder's office of *Fayette* county, on the 1st day of *July*, 1846.

On the 14th of *February*, 1856, *Golvin Somers*, sen., by deed, conveyed the whole of said quarter section of land, and forty acres of the adjoining quarter, in fee, to the appellants, *Isaac* and *Jonathan Somers*, his sons by a former marriage. The consideration expressed in the deed is \$6000, but the evidence shows that the consideration actually paid was \$2500, which, by the direction of *Golvin Somers*, was paid to his other children, to whom *Isaac* and *Jonathan* executed their notes. *Elizabeth*, the wife, did not join in this deed.

Golvin Somers, sen., died in 1858, and his wife *Elizabeth* died some time afterward, without issue.

The plaintiffs, who are the brothers and sisters, and heirs at law, of *Elizabeth Somers*, claim by descent from her, the interest in the quarter section of land conveyed to her by her father, *Silas Pumphrey*, and bring this suit to recover the same, and to set aside, as void, the deed of *Golvin* and *Elizabeth* to *Stineman*, the deed of *Stineman* to *Golvin Somers*, and the deed of the latter to *Isaac* and *Jonathan Somers*, so far as it conveys the interest formerly held by said *Elizabeth* in the quarter section of land conveyed to her and her sister *Jane* by their father.

The reasons alleged in the complaint for setting aside said deeds are :

1. That the said *Elizabeth*, at the time she executed the deed to *Stineman*, was of unsound mind, and, therefore, incapable of making the same.

2. That the deed to *Stineman* was procured from said *Elizabeth* by the fraud, covin and deceit of said *Golvin* and *Stineman*, in falsely representing to her that, unless she executed it, the land would be taken to pay the debts of said *Golvin*; and that the deed from *Golvin* to *Isaac* and *Jonathan Somers* was made without any valuable consideration whatever.

3. That the deed to *Stineman*, though signed and acknowledged, was never delivered to him, but that said *Golvin*, without having delivered the same, had fraudulently procured it to be recorded. It is also averred that there was no valid consideration for the said deed.

The defendants answered by general denial, and one special paragraph. The latter is not important in the examination of the questions raised on the record, and, therefore, will not be further noticed.

The suit was originally instituted in the *Fayette* Circuit Court, but, on change of venue, was transferred to the *Franklin* Circuit Court. There was a jury trial, and finding for the plaintiffs, upon which the court, over a motion

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for a new trial by the defendants, rendered judgment in accordance with the prayer of the complaint.

The defendants appeal. The questions urged here, upon which a reversal of the judgment is claimed, arise upon instructions given, and instructions refused, and upon the alleged insufficiency of the evidence to sustain the finding of the jury.

We will first examine the questions as to the instructions given and refused.

The court, at the instance of the plaintiff below, instructed the jury as follows:

1. "If you believe, from the evidence, that, at the time the deed was made by *Golvin Somers* and his wife to *John Stineman*, the wife, *Elizabeth*, was a person of unsound mind, the deed is void, and would pass no title: the heirs of *Elizabeth* would inherit the land at her death; and, if the plaintiffs are her heirs, they would be entitled to recover in this case."

2. "If, at the time of the execution of the *Stineman* deed, the said *Elizabeth* was a person of such weak intellect that she was not capable of comprehending the effect of the transaction on her legal rights, she would be, in legal contemplation, a person of unsound mind, and the deed would be void."

These instructions are both erroneous. They both assume that if *Elizabeth* was of unsound mind at the time she executed the deed to *Stineman*, the deed was void, and conferred no title on *Stineman*. No inquest was ever organized under the provisions of the statute, by which *Elizabeth* was found to be a person of "unsound mind," nor had she ever, in any manner, been placed under guardianship as a person of unsound mind; and it has been held by this court that the deed of a person of unsound mind, not under guardianship, conveys a seisin, it being voidable only, and not void. *Crouse v. Holman*, 19 Ind. 80; see also the authorities there cited.

On the question of the unsoundness of mind, the

defendants below asked the court to instruct the jury as follows, viz :

10. "Mere weakness of understanding is no objection to a person disposing of his or her property. Courts and juries cannot measure the size of people's understanding and capacities, nor examine into the wisdom or prudence of persons in disposing of their estate."

11. "That if the jury, from the evidence, should even believe that *Mrs. Somers* was a woman of weak mind, that would not be sufficient to authorize them to set aside her deed."

The court refused to give these instructions as asked, but, as a substitute for No. 11, instructed the jury, "That if they, from the evidence, should even believe that *Mrs. Somers* was a woman of weak mind, it would not be sufficient to set aside her deed: provided, she had sufficient capacity to understand the nature of the contract she made." The instructions asked by the defendant, we think, were substantially correct, and applicable to the evidence in the case, and should, therefore, have been given as asked. The qualification added by the court to the eleventh was incorrect, and well calculated to confuse and mislead the jury.

A clear distinction is drawn in the law, between mere weakness of intellect and insanity, or unsoundness of mind. Mere weakness of mind is not idiocy or insanity, nor does it amount to "unsoundness of mind," within the meaning of the law. But the qualification added by the court confounds them, and destroys the distinction; besides, it was calculated to leave the impression that if the evidence showed that *Elizabeth* was a person of weak mind, it would be sufficient to avoid the deed, unless the defendant could show that, notwithstanding such weakness, she had sufficient capacity to understand the nature of the contract. This would be changing the burden of proof. See 2 Kent. Com. marg., p. 452; Chitty on Con. 130; 1 Pars. on Con. 888.

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The court, at the request of the plaintiffs below, also gave the jury the following instructions:

4. "If the deed to *Stineman* was procured by fraud, it is void, and any misrepresentation made to her, which deceived and misled her, and induced her to execute this deed, is a fraud."

5. "Any concealment of the legal rights of said *Elizabeth*, of which she had no knowledge, was a fraud, and if the deed was thus procured it is void."

6. "If the deed to *Stineman* was void by reason of the unsoundness of mind of said *Elizabeth*, or of fraud, or of non-delivery, the heirs of said *Elizabeth* have a right to recover the land, no matter how many deeds have been executed since, by parties claiming under the *Stineman* deed."

These instructions were also excepted to, and the giving of them is urged as error. They are all drawn with extreme carelessness, and are very vague and indefinite, and should have been refused for that reason, if no other objection existed to them. But they do not properly express the law, and are, for that reason, erroneous.

The fourth one instructed the jury that "if the deed to *Stineman* was procured (from *Elizabeth*, was probably intended) by fraud, it is void." In such case, the deed would not be void. If fraudulent, still it conveyed a *seizin*, and invested *Stineman* with the title; it was, therefore, not void, but only voidable, and hence, if the defendants, *Isaac* and *Jonathan Somers*, were innocent purchasers for a valuable consideration, they were entitled to succeed upon that issue.

The only fraudulent representation charged in the complaint to have been made to induce *Elizabeth* to execute the deed, is that if she did not execute it, the land would be liable for her husband's debts; but, in this instruction, the court said to the jury, that "any misrepresentations made to her, which deceived and misled her, and induced her to execute the deed, is a fraud," and that if the deed was procured by fraud, "it is void." The instruction is very

much broader than the issue, and should not have been given.

The fifth instruction is clearly inapplicable to the issue, and the evidence in the case, and was, therefore, liable to confuse and mislead the jury; besides, it does not express the law, and hence the court erred in giving it.

The sixth instruction, among other things, lays down the proposition, that if the deed to *Stineman* was procured from *Elizabeth* by *fraud*, her heirs have a right to recover the land, no matter how many deeds have been executed since, by parties claiming under the *Stineman* deed. This is clearly not the law. *Isaac* and *Jonathan Somers* claim to be purchasers from their father, *Golvin Somers*, for a valuable consideration, and without any notice of the alleged fraud; and if so, they are protected in their purchase, and will hold the land against the heirs of *Elizabeth*, notwithstanding such fraud.

At the request of the defendants, the court instructed the jury, that "if they believe, from the evidence, that the defendants bought the land of their father for a valuable consideration, and have paid the same, the plaintiffs cannot recover the lands back from them, even though the deed from the said *Elizabeth* to *Stineman* was obtained by the fraud of their father, unless they were parties to it, or knew of it at the time of their purchase."

This instruction seems to contain a correct exposition of the law arising upon the assumed state of facts, but it is in direct conflict with so much of the foregoing sixth instruction, asked by the plaintiffs, and given by the court, as relates to the same subject. The two charges are inconsistent with each other, and cannot be reconciled. Neither of them was drawn by the court, and their inconsistency was, doubtless, overlooked; still they were both given to the jury as the law, and, being inconsistent with each other, must have left the jury in doubt and uncertainty which to believe. It was error to place the jury in such a condition.

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The defendants asked the court to instruct the jury:

2. "That if the defendants held the land in controversy by deed from *Golvin Somers*, and paid him a valuable consideration for it, not knowing, at the time of their purchase, that the said *Elizabeth Somers* was of unsound mind at the time she executed the deed to *Stineman*, or that the same had been obtained by fraud, the plaintiffs cannot recover."

We have already shown, that if the defendants, *Isaac* and *Jonathan Somers*, were innocent purchasers, in good faith, for a valuable consideration, their title would not be affected by the fraud of *Golvin Somers*, or *Stineman*, in procuring *Elizabeth* to execute the deed to the latter. But this instruction goes further, and assumes that the same rule would apply if *Elizabeth* was of unsound mind at the time she executed the deed. The authorities are not uniform as to the effect, in various cases, that may be given to the contracts of persons who are of unsound mind at the time of making them. The general rule, however, applicable to contracts of the character of that under discussion here, seems to be settled, that such contracts may be avoided, either by the persons themselves, or their legal representatives. See *Chitty on Cont.* 5 Am. from 3 Lond. ed., pp. 185 to 189; 1 Pars. on Cont., ch. xx, p. 383. But if reason be again restored, the contract, made when the person was of unsound mind, may be affirmed. *Crouse v. Holman*, 19 Ind. 80.

The contract of a *non compos mentis* differs materially from one procured by fraud from a person of sound mind. In the latter case, the contract is made by one of sufficient capacity, and competent to make it, and his mind has consented to it, but that consent has been induced by the fraud of the other contracting party; but, if the person is *non compos mentis*, there is a want of capacity to contract; he does not, in a legal sense, consent, because there is a want of that mental capacity essential to a legal consent. In this respect, the case seems to be

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analogous to the contract of an infant, in whom there is, also, a want of capacity to contract, and it has been held that a deed made by an infant might be avoided by his heirs, though the estate had passed into the hands of a *bona fide* purchaser, for a valuable consideration. *Doe ex dem. Moore et ux. v. Abernathy*, 7 Blackf. 442.

We think the instruction was correctly refused.

The court was also asked, by the defendants, to give to the jury the following instruction:

8. "That if *Somers* and wife and *Stineman* met together, and *Somers* and wife made, signed and acknowledged the deed in controversy, on one evening, leaving the deed in the room where it was signed and acknowledged, and where *Somers* and his wife resided, *Stineman* residing in a part of the same house, and if *Stineman* and his wife went back into the same room next morning, and made, signed and acknowledged the deed back to *Somers*, and left both deeds with *Somers*, who, afterward, got them recorded, that this was a good and valid delivery of both deeds."

The court refused to give the instruction as asked, but gave it with a qualification, by omitting the words at the close, "that this was a good and valid delivery of both deeds," and adding, instead thereof, these words: "*That this was evidence tending to show a delivery of the deed in controversy.*" There is no controversy in the case as to the delivery of the deed from *Stineman* and wife to *Golvin Somers*.

Ordinarily, the question as to the delivery of a deed is one of fact, to be determined by the jury. But it may arise in a form to present only a question of law for the determination of the court, or it may present a mixed question of law and fact, in which the jury determines the facts, and the court the law arising upon the facts as proved.

The law does not prescribe any particular form of words, or actions, as necessary to consummate a delivery. Any thing done by the grantor, from which it is apparent that a

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delivery is thereby intended, either by words or acts, or by both combined, is sufficient.

In *Dearmond v. Dearmond*, 10 Ind. 194, it is said that, "The question, what constitutes the delivery of a deed, has been much discussed. It is much a question for the jury in each particular case. A deed may be delivered by words without actions, and by actions without words. 7 Petersdorff 660. It may be delivered without being actually handed over. Chit. Con. 8. If once delivered, its retention by the grantor does not divest the title of the grantee. *Connelly v. Doe*, 8 Blackf. 820."

"To constitute a delivery, it would seem that the deed must pass under the power of the grantee, or some person for his use, with the consent of the grantor. Petersdorff *supra*; *Wilson v. Cassidy*, 2. Ind. 562."

In *McNeely et al. v. Rucker*, 6 Blackf. 391, in which *Rucker* and his wife conveyed real estate held by the wife, in fee simple, before her marriage, to the grandson of the husband, and the deed was sent by the husband, in the presence of the wife, to be recorded, it was held, that the deed having been signed, sealed and acknowledged by the husband and wife in due form, and sent by the former, in the presence of the latter, to the recorder's office to be recorded, it was legally delivered.

And so in *Mallett et ux. v. Page et al.*, 8 Ind. 364, it is said: "It seems clear that the mortgage was delivered. It was left for record at the proper office, and that is *prima facie* a delivery. No particular form is necessary to perfect a delivery of a deed. A deed may be delivered by any acts or words evincing the intention of the grantor to deliver it. Thus, in *Folly v. Vantuyl*, 4 Halst. 153, *Folly* made a bond to his daughter, and holding it up to her, said: "*Mary*, this is your bond, what shall I do with it?" adding, "I will take care of it for you;" he then endorsed it, "*Mary's bond*," and put it away in his trunk. This was held to be a good delivery.

A reference to the evidence will show the relevancy of the instruction to the facts in the case.

Three witnesses, *Stineman* and his wife, and *Golvin Somers, jr.*, testified in reference to the execution of the two deeds. *Stineman* testifies that he was working for *Golvin Somers, sen.*, and lived in the kitchen of *Somers'* house, on the land in controversy; *Somers* and his wife living in the adjoining room of the same house; that some time prior to the day on which the deed in controversy was made, *Somers* told him that he (*Somers*) wished to deed his land to him (*Stineman*), but did not give any reason for it; that, on the evening when the deed was executed, *Somers* invited him and his wife into the room where *Somers* lived; that they went in, and found *Somers* and his wife, and *Esq. Bonham*, in the room; that *Bonham* wrote the deed, and took the acknowledgment, and laid the deed, after it was signed and acknowledged, on a stand; that he saw the deed open on the stand, and saw the writing in it, and in some way learned what it was, but that *Somers* did not tell him why he had invited him into the room; that to the best of his recollection, he did not have the deed in his hand; he did not read it, nor did any person read it to him; that *Somers* did not deliver it to him, nor offer to do so; that before he left the room, *Bonham* folded the deed up, and laid it down again on the stand, and, he thinks, it was still there when he left the room. That early the next morning, *Somers* again invited him and his wife into the same room, and told him that he wanted him and his wife to deed the land back again to him (*Somers*); that when they went into the room that morning, the same persons being present as on the evening previous, *Bonham* wrote the deed to *Somers*, and they (*Stineman* and his wife) signed it and acknowledged it; the first deed, he thinks, was still on the stand the next morning, and he left them both there, and gave no direction of any kind in reference to them.

Mrs. Stineman corroborates, substantially, the testimony of her husband, except that she says, that after she and

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her husband went into *Somers'* room, in the evening, and before the first deed was signed, *Somers* said: "I am going to deed the land to you," speaking to her and her husband.

Golvin Somers, jr., was examined for the defendants, and testified that he was present at the execution of both the deeds; that in the evening, when *Bonham* was about to take the acknowledgment of the deed to *Stineman*, he read it aloud in the presence of all the parties; and that after it was signed and acknowledged, *Bonham* offered the deed to *Stineman*, who took it out of *Bonham's* hands, stood a moment, and said he reckoned he might as well leave the deed with *Somers*, that he had no convenient place of taking care of it, and thinks he threw it down on a stand. He further testified that *Elizabeth Somers* wrote her own name to the deed; that *Stineman* and wife, the next morning, executed a deed conveying the same land back to *Golvin Somers, sen.*

It will be observed that *Golvin Somers, jr.*, testifies to an actual delivery of the deed to *Stineman*, but his statement, in that respect, is contradicted by *Stineman* and his wife. The instruction, however, asked by the defendants, is founded upon the evidence of *Stineman* and his wife alone, leaving out of view the evidence of *Golvin Somers, jr.*

Any presumption of an intention to deliver the deed by *Somers* and his wife, to be drawn from the facts and circumstances occurring at the time, and connected with the signing and acknowledgment of the deeds, and of their final possession by *Somers*, was a question of fact for the jury, and, however strongly they may have tended to show a delivery of the deed to *Stineman*, it was, nevertheless, the province of the jury to determine the fact. But an additional fact is assumed in the hypothetical instruction asked, and is clearly shown by the evidence, that must not be overlooked in determining the correctness of the action of the court in refusing to give the instruction as prayed. We refer to the fact that, soon after the execution of the deeds,

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Golvin Somers took, or sent, them to the recorder's office, and procured them to be recorded. An actual delivery of the deed by *Golvin Somers* to *Stineman*, in the absence of fraud, would be deemed a delivery also by the wife. And according to the authorities, *supra*, the leaving of the deed at the recorder's office by *Golvin Somers*, one of the grantors, to be recorded, is, at least, a *prima facie* delivery to *Stineman*, such act being regarded by the law as an unconditional delivery to a third person, for the use of the grantee. *Tompkins, &c., v. Wheeler et al.*, 16 Peters 106.

We think the instruction, as asked, was substantially correct, and should have been given.

There are other facts and circumstances, presented by the evidence in the case, not referred to in the hypothesis upon which the instruction is based, which, we think, have an important bearing on the question. It is clearly shown that the object of *Somers* and his wife, in executing the deed to *Stineman*, was that he should convey the land to *Golvin Somers*, the husband. The latter had paid the \$600, the consideration money, to *Silas Pumphrey*, and for that reason, *Mrs. Somers* desired that he should have the land. The title was in her, and she could not convey it directly to her husband. It was, therefore, conveyed to *Stineman*, that he might convey to *Somers*. *Stineman* was but a naked trustee, to receive the title for, and transmit it to, *Somers*; a mere conduit, through whom the title to the land was conveyed from *Mrs. Somers* to her husband. The delivery of the deed to *Stineman* was necessary to accomplish that object, and it seems clear that when it was signed and acknowledged by the grantors, it was so placed at the disposal, or under the power, of *Stineman*, as in the intention of *Somers* and his wife, to constitute a delivery. *Stineman*, too, must have so regarded it, for, acting upon the assumption of its delivery, by which the title became vested in him, he conveyed the land, the next morning, to *Somers*. There is also evidence, which is uncontradicted, that *Mrs. Somers* declared her desire and intention to have

the land conveyed to her husband, and, after the conveyances were made, spoke of the deed as having been executed, and of her object in executing it, and said that the land belonged to her husband. These facts, taken in connection with the fact of placing the deed upon record, we think, should be conclusive that the deed was legally delivered.

The evidence is all in the record, and, after a careful examination, we find nothing in it reasonably tending to prove that the execution of the deed by *Mrs. Somers* was procured by fraud, as charged in the complaint.

The only remaining question to be examined is, does the evidence sustain the finding of the jury for the plaintiffs, on the alleged ground that *Elizabeth Somers*, at the time of the execution of the deed to *Stineman*, was of unsound mind?

Bouvier, in his Law Dictionary, defines the words *non compos mentis* to "signify, not of sound mind. This is a generic term, and includes all the species of madness, whether it arises from: 1, idiocy; 2, sickness; 3, lunacy; or, 4, drunkenness."

To the same effect is our statute, which enacts that "The words, 'person of unsound mind,' as used in this act, or any other statute of this state, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person."

The evidence in this case in no wise tends to prove that *Elizabeth Somers* was either a lunatic, monomaniac, or distracted person. But if any defect of mental capacity existed, it was organic, and existed from her nativity. If she was of unsound mind, within the meaning of the statute, she was an idiot.

Before looking to the evidence, it is proper that we first ascertain the legal meaning of the word idiot, in its application to the alleged unsoundness of mind of *Mrs. Somers*, at the time she executed the deed.

Bouvier says that *idiocy* is "that condition of mind in

which the reflective, or all, or a part, of the affective powers, are either entirely wanting, or are manifested to the least possible extent. Idiocy generally depends upon organic defects." And that an *idiot* "is a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. It is an imbecility, or sterility, of mind, and not a perversion of the understanding. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding."

This rule would seem to be a sufficient test of the want of understanding, where the power to the extent indicated does not exist; but to hold that a person should be deemed of sound mind, and responsible for his acts in every case, where he possesses sufficient mental capacity to count twenty, and tell his father's and mother's names, or his own age, would seem to fix a rather low and uncertain standard of a sound mind.

Mr. Chitty, in his work on Contracts, p. 180, says: "An idiot, or natural fool, is one that hath had no understanding from his nativity; and who is, therefore, by law, presumed not to be likely to attain to any. A person is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters."

The same definition, substantially, is given by *Petersdorff*, vol. 12, p. 390.

The law does not assume to measure the different degrees of power of the human intellect, or to distinguish between them, where the power of thought and reason exists. It would be impossible to do so. But it attempts to draw a line between sanity and insanity, or, in other words, between the presence and absence of reason, thought and comprehension. It cannot go further.

It is said by *Mr. Parsons*, in his able work on Contracts, vol. 1, p. 134, that, "Courts of law, as well as equity, afford protection to those who are of unsound mind. They

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endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence. Against the consequences of mere imprudence, folly, or that deficiency of intellect which makes mistake easy, but does not amount to unsound or disordered intellect, even equity gives no relief, unless the other party has made use of his want of intelligence to do a certainly wrongful act."

Chancellor KENT lays down the rule thus: "Imbecility of mind is not sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties, or an *incapacity of understanding and acting with discretion in the ordinary affairs of life*. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and, if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him." 2 Kent Com. 573. This, it seems to us, is the correct rule.

Tested by this rule, how stands the case upon the evidence? The evidence on the point is quite voluminous, and we do not propose to give a detailed abstract of it in this opinion. But we have examined it with much care, and find that the following material facts are established by it beyond controversy, viz:

That *Elizabeth* had learned to read and write, and signed her own name to the deed to *Stineman*. She was a member of a reputable church, and in good standing. Her mother died many years before her marriage to *Somers*, and, being the eldest of three sisters, she took charge of her father's household affairs, and conducted them prudently, and with, at least, ordinary skill, and continued to do so until her marriage; that upon her marriage with *Somers*, she took charge of his house, having exclusive control of his household, and discharged the various duties with ordinary skill and judgment. She did most of her own sewing, and taught and instructed the infant daughters of *Somers* in all the ordinary domestic duties, including cooking, knitting

and sewing, and is said to have been a good cook. In a word, she discharged with fidelity her duties as a member of the church, as a dutiful daughter, and as a faithful wife and step-mother.

Her father recognized her to be of sound mind, by trading with her, executing to her a deed for the land in controversy, and taking from her a note for the purchase money, and by permitting her to contract marriage without opposition.

Thirteen witnesses were examined on the part of the plaintiffs, in reference to the mental capacity of *Mrs. Somers*. Three of the number were medical men, the others not claiming to be experts; most of whom seem to have been allowed to express their opinions of her capacity in their own way, without first stating facts within their knowledge, on which to base an opinion.

Their whole evidence, however, falls far short of establishing the fact that she was an idiot, or of unsound mind. It does not fairly tend to prove more than that she was a person of weak mind.

We select the evidence of *Dr. Silvey*, as a fair version of that of all those who testify most strongly against the defendants. He says he regarded *Elizabeth* as a woman of weak mind; she might have made a housekeeper, but he thinks an inferior one. He thinks, without instruction, she would not comprehend the effects in future, on her legal rights, of any transaction. She was not an *idiot*, nor of strong mind, but below a medium. He thinks ten per cent. of women as weak as she was.

On the other hand, seven witnesses, including one physician, examined on the part of the defendants, testified that *Elizabeth* was a woman of medium mind and understanding. We do not, however, claim to weigh the evidence, and determine its preponderance; that was the province of the jury. But excluding entirely the evidence given for the defendants, and looking alone to that of the plaintiffs, it seems to us clear that it does not, fairly considered, even

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reasonably tend to establish the fact that *Elizabeth Somers* was of unsound mind at the time of executing the deed to *Stineman*. It does not prove that there was an "essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life." For the various reasons given in this opinion, the judgment is reversed, with costs, and a new trial awarded, and the cause remanded to the court below for further proceedings, not inconsistent with this opinion.

N. Trusler, J. S. Reid, G. Holland and C. C. Binkley, for appellants.

J. C. McIntosh, B. F. Claypool and J. M. Wilson, for appellees. ✓

DENNY v. REYNOLDS and Another.

REPLEVIN.—SUIT ON BOND.—Where the right of property has been tried in an action of replevin, it becomes *res adjudicata*, and cannot, nor can any other issue tried and determined in such suit, be again put in issue in an action on the replevin bond.

APPEAL from the *Knox Common Pleas*.

ABSTRACT.

This is a suit brought by the plaintiff below on a replevin bond. The appellant, defendant below, filed his answer, setting up, among other things, that the *Stantons*, the execution defendants, and from whom he purchased the property replevied, had other property subject to execution in their possession, to the amount of \$3000, none of which had been sold at the time the said execution came into the hands of *Reynolds*, the sheriff; and that *Reynolds*, with a full knowledge of all these facts, and with a full knowledge of the sale of the property, levied upon and

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took from appellant said property; that since the levy was made, the said sheriff *Reynolds* permitted the said *Stanton* to take out of this state all of said property, and that said *Stantons* are now insolvent, and appellant is without remedy, caused by the negligence of said sheriff *Reynolds*. To this answer, the plaintiffs below demurred, the demurrer was sustained, and appellant excepted, and this ruling presents the only question in the case. Appellant insists that this answer showed a state of facts which entitled him to the relief demanded.

RAY, J.—The record of the judgment filed with the complaint in the court below shows a submission of the issues in the replevin suit to the court, and a finding for the defendant in the action.

The only issues involved were, whether the property in controversy was owned by the *Stantons*, and if so, whether it was liable to execution at the time the writ came into the hands of the sheriff. The finding of the court involved a decision of these issues, and the judgment rendered was, therefore, conclusive upon the appellant. The answer, in the case under consideration, attempts to present the same issue as matter of defense to the action upon the bond. This cannot be done. In the case of *Wallace v. Clark*, 7 Blackf. 298, Mr. Justice SULLIVAN, in delivering the opinion of the court, uses this language: "When the right of property is put in issue and decided upon, it is then *res adjudicata*, and cannot, on general principles, be again inquired into in a suit between the same parties." This is the rule as to all questions involved in the decision of the replevin suit. The demurrer was, therefore, properly sustained.

The judgment is affirmed, with 3 per cent. damages, and costs.

N. Usher, F. W. Viehe and C. M. Allen, for appellant.

J. Baker, for appellees.

Abel v. Opel and Wife.

ABEL v. OPEL and Wife.

TENDER.—The tender of an amount of money in discharge of a debt is an admission of the amount due, but is not conclusive, and if too much has been tendered, no obligation is created to pay or keep good the whole amount tendered.

APPEAL from the *Dubois* Circuit Court.

FRAZER, J. — *Opel* and wife brought suit against *Abel*, to compel the entry of satisfaction of a mortgage. The complaint alleged that the defendant held a note of *Opel* for \$1440, due *March* 25, 1864, and a mortgage on real estate, to secure the same; that the consideration of the note was an indebtedness of \$600, and a loan of \$500, with interest thereon, at 10 per cent per annum, added for three years. It was sought to avoid so much of the interest as exceeded the rate of six per cent per annum, and it was alleged that, on the 19th of *May*, 1864, the sum of \$1309 had been tendered and refused, and that sum was brought into court. After a demurrer to the complaint had been overruled, an issue was made by a general denial of the complaint, which was found for the plaintiffs; and, over a motion for a new trial, there was judgment upon the finding.

1. Was the complaint sufficient? There is in it an averment in this language: "That at the time said note and mortgage became due, to-wit: on the 25th day of *March*, 1864, the said defendant was entitled to recover of the plaintiff thereon, only the amount of \$1298, as principal due on said note and mortgage with three years' interest, at the rate of six per cent. per annum." It is urged that the meaning of this is, that there was, at the date mentioned, the sum of \$1298 due as principal, and that interest on that sum, at 6 per cent. per annum, was also due. And it is argued that, therefore, \$1309, on the 19th of *May*, 1864, was not a sufficient tender. We cannot assent to the justice of this criticism. The language quoted, taken alone, will not,

without interpolating a punctuation not required by its grammatical construction, and not found in the transcript, bear the interpretation contended for by the appellant; but when the whole complaint is considered, its meaning is so obvious that the question thus made upon it is too plain for fair controversy. The action of the court below, upon the demurrer, was certainly correct.

2. The evidence established the fact that the sum of \$1440 was tendered; in all other respects, the allegations of the complaint were precisely sustained. It is contended that, after a tender of \$1440, relied on in evidence, it was not sufficient to bring into court only \$1809; and that the tender was an admission that the sum tendered was due, and that, therefore, the court ought to have found that sum to be due, instead of the sum of \$1809. It is true that the tender was an admission of the amount due; but that admission was not conclusive evidence, excluding the consideration of all other evidence upon the subject. The proof was clear that \$1809 was the amount actually due when the tender was made. Nor can we agree that if too much be tendered, any legal obligation is thereby created to pay, or keep good, the whole amount so tendered.

The note secured by the mortgage was not offered in evidence. We do not think it was necessary that the plaintiffs, in this case, should do so. The mortgage was put in evidence, and it contained a description of the note sufficient for all the purposes of the case. Upon the whole, we think that the finding of the court below was in accordance with the evidence.

The judgment is affirmed with costs.

J. Baker, for appellant.

J. C. Denny, for appellee.

Mitchell v. Smith.

MITCHELL v. SMITH.

JUSTICE.—JURISDICTION.—In an action before a justice of the peace, the footing of the account filed as the basis of the action was \$200, but a correct addition of the items charged was a fraction of a dollar more.

Held, that the footing, or sum stated on the account, must be taken to be the amount for which judgment was demanded, and, hence, the justice had jurisdiction.

JUDGE PRO TEMPORE.—Where a person other than the regular judge has tried a cause below, and no objection was made on the trial to his authority, and the record is silent upon the subject, such objection cannot be raised for the first time in the Supreme Court.

APPEAL from the *Hendricks* Common Pleas.

FRAZER, J.—This case originated before a justice of the peace. The venue was changed to another justice, before whom the judgment was rendered against the appellant, who thereupon took the case, by appeal, to the common pleas, and thence to this court.

The first question presented for our examination is as to the jurisdiction of the justice to try the cause.

The cause of action first filed was in the form of an account, the footing upon which was \$200, though the correct aggregate of the items was \$200 75. This was indorsed thus: "Demand \$176 75." The amount footed on the account, as filed with the justice, ought, we think, to be taken as the amount for which judgment was demanded, in the absence of any other statement of the demand. If this be correct, it is unnecessary to determine whether the demand on the back of the paper ought to be regarded as a part of the complaint, though the indulgence which has always been extended to pleadings in justices' courts, in this state, would, doubtless, justify us in so regarding it. Either of these propositions settles the question against the appellant.

The Hon. SOLOMON BLAIR tried the cause in the common pleas, acting as judge thereof, he not then being the regular judge of that court. No objection was made to him, nor

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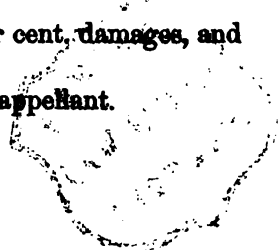
does the record affirmatively show his authority. It is wholly silent upon that subject. His authority is questioned for the first time here.

This question was recently before us, in *Feaster v. Woodfill*, 23 Ind. 493, and received very careful consideration, and upon principle and authority, and in view, also, of the vast mischief which, it seemed to us, must result from a contrary doctrine, we held that when the record was silent as to the authority of the person acting as judge for the time being, and no question concerning his authority was made below, it was too late to make it in this court, and that, under such circumstances, we would hold his proceedings valid. Some reflection since has tended only to confirm us in that opinion.

The judgment is affirmed, with 5 per cent. damages, and costs.

T. A. Hendricks and O. B. Hord, for appellant.

C. C. Nave, for appellee.



FARRINGTON v. HAWKINS.

24 258
159 249

AMENDMENTS.—The plaintiff has a right, at any time before his complaint is answered, to amend his pleadings, and to file additional paragraphs.

SAME.—Where an additional paragraph, filed to a complaint, counts upon a cause of action which accrued subsequent to the service of the summons, it may be stricken out on motion, or, if the defendant appears thereto, he is entitled, on application, to a continuance of the cause. The filing of a demurrer to the paragraph would be a waiver of this right.

APPEAL from the *Howard* Common Pleas.

RAY, J.—This action was brought by the appellee against the appellant.

The original complaint contained two paragraphs. The first was for the taking and converting to appellant's

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own use of four hundred and fifty bushels of corn; the second paragraph charged the conversion of certain other two hundred and fifty bushels of corn, all the property of appellee. After the service of the summons, the appellee filed a third paragraph, charging that since the commencement of the suit, the appellant had taken and converted an additional amount of corn. This third paragraph is called a supplemental complaint. The appellant filed an answer to the first and second paragraphs, and a demurrer to the third. The ground of the demurrer was that facts sufficient were not stated in the third paragraph to constitute a cause of action. The court properly overruled the demurrer. The plaintiff had a right, at any time before his complaint was answered, to amend his pleadings, and to file additional paragraphs. That he styled the additional paragraph a supplemental complaint is immaterial. Our practice deals with the facts stated in the plea; if those facts give a cause of action, it is sufficient, though the pleading may be, as in this case, inaptly named. The paragraph was not a supplemental complaint, but was for the conversion of a distinct and separate quantity of corn from that referred to in the first and second paragraphs of the complaint. Upon the filing of this additional paragraph, the appellant could have moved the court to strike it out, the cause of action stated therein having accrued subsequent to the service of the summons; or, appearing thereto, have asked, and was entitled to receive, a continuance of the cause. This right he waived by his demurrer.

The judgment is affirmed, with 8 per cent. damages, and costs.

Linsday and Lewis, for appellant.

H. A. Brouse, for appellee.

Groom, Auditor of Tipton County, v. The State, on the relation of Bowlin.

GROOM, Auditor of Tipton County, v. THE STATE, on the relation of BOWLIN.

24 255
186 145

SINKING FUND SALES—TAXES.—Where lands mortgaged to the Sinking Fund are offered for sale for the non-payment of the mortgage debt, and are bid in for the State, and subsequently sold, the purchaser is entitled to take the lands freed from all assessments and taxes made or levied between the date of the mortgage and the date of his deed from the State. But where the lands are not bid in for the State, but are taken by a purchaser at the first offer, they remain subject to such assessments and taxes.

APPEAL from the *Tipton* Common Pleas.

ABSTRACT.

The transcript discloses that on the 6th day of *May*, 1864, the appellee filed in the clerk's office of the Court of Common Pleas of *Tipton* county, her complaint, on the relation of *Christopher C. Bowlin*, averring and alleging that on the 8th day of *May*, 1858, one *Sylvester Turpin* mortgaged to the Sinking Fund the parcels of land in the complaint particularly described, containing some ninety-nine acres, and that, on the 18th day of *February*, 1864, said lands were sold by the Sinking Fund to one *T. W. Phillips*, and a deed made to *Phillips* therefor; that prior thereto, on the 5th day of *February*, 1862, said lands were sold by the auditor of *Tipton* county, and bid in by the relator, for the amount due for state and local taxes for the years 1858, 1859, 1860 and 1861, all of said taxes being levied and collected during the time said lands were under mortgage to the Sinking Fund, and being, as is averred, illegally assessed and collected. The complaint further avers a demand by the relator, on the appellant, to issue his warrant on the treasurer of *Tipton* county, for the aforesaid sum of money, so paid over by the relator, with interest, which, it is averred, appellant refused to do, and a writ of *mandamus* is prayed against appellant, as such auditor, to compel him to issue his warrant to the treasurer.

Groom, Auditor of Tipton County, v. The State, on the relation of Bowlin.

Appellant filed his demurrer, alleging for cause that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and appellant failing and refusing to plead over, judgment was rendered in favor of the relator, and that the relator was entitled to an order for the sum so paid, and it was ordered and adjudged that appellant, as auditor of *Tipton* county, issue his order on said treasurer, in favor of the relator, for the aforesaid sum of money.

RAY, J.—The act “To amend the several acts for the loaning and collecting of the Sinking Fund, and for other purposes,” approved *January 13, 1845*, provides that “in cases of future sales of lands and lots *bid in for the State*, and in all cases of sales heretofore made, or hereafter to be made, upon foreclosure of mortgages to said fund, a certificate of purchase, signed by the president of the board, or by any member thereof by order of the board, shall be deemed sufficient evidence of such purchase; and where full payment of the purchase money shall have been, or may be, made, it shall be lawful for the president of the board to execute and deliver to the purchaser, or purchasers, his, her or their heirs or assigns, in the name of the state, a patent, or deed, for such lands or lots, which shall vest in him, her or them, and in his, her or their heirs and assigns forever, all the right, title and interest which the mortgagor had in the lands or lots mortgaged, *and bid in and sold*, at the date of the mortgage, freed and discharged from all taxes and assessments made or levied for any purpose whatever, between the date of said mortgage and the date of said deed, or patent.”

The repealing act of 1852 excepts “All laws relative to the Sinking Fund,” and “all laws regulating the Sinking Fund.” It is insisted by the appellees that under this act, the purchaser at the sinking fund sale was entitled to receive from the state a deed for the mortgaged property, “freed and discharged from all taxes and assessments made

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or levied for any purpose whatever, between the date of said mortgage and the date of said deed or patent." A careful reading of the provisions of the act leads us to a different conclusion. The exemption, by the terms of the law, applies only to "lands or lots mortgaged, and bid in and sold." This language, in connection with the requirements of other provisions of the law, that the land should be first offered for sale, and should only be bid in by the State when a sum sufficient to pay the mortgage debt, interest and costs, was not tendered, clearly shows that neither by the letter nor the spirit of the act should such first offer of sale be regarded as intended to release the property then sold from the lien of taxes. It is only when such offer has been made subject to taxes, and a failure to sell has afforded *prima facie* evidence that the land is not worth both the mortgage debt, interest and costs, with the addition of the taxes assessed, that the State, electing to secure the trust fund rather than the taxes, which are due partly to herself, waives the lien of those taxes, and authorizes the property to be bid in for the State, and afterward offered for sale for the sum due upon the mortgage.

The case of *Hamilton, Auditor, &c., v. Langsdale*, 1 Ind. 128, does not conflict with the construction we place upon the act. In the case cited, the land had been bid in for the State, and was subsequently sold to *Langsdale*. In the case at bar, the land was purchased at the sinking fund sale, and does not seem to have ever been bid in for the State. Had it been otherwise, the purchaser, having acquired his title by purchase at tax sale two years before the Sinking Fund Commissioners offered the land under the mortgage, might, perhaps, have been required, if he desired to perfect his title, to pay off the mortgage debt and release the property, and assert his tax title to the land. The present state of the pleadings does not require us to decide this point. The demurrer should have been sustained to the complaint.

McKinlay and Others v. Shank.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

G. W. Lowly and *N. R. Overman*, for appellant.

J. Green, for appellee.

McKINLAY and Others v. SHANK.

AFFIDAVIT FOR CONTINUANCE.—An affidavit for the continuance of a cause on account of the absence of a witness whose place of residence is alleged to be unknown, must show that diligence has been used to ascertain the whereabouts of the absent witness.

VARIANCE.—PROMISSORY NOTE.—In a complaint upon a promissory note, the note was described as payable to the plaintiff, while the note filed with the complaint, and given in evidence, was payable to "A, or bearer."

Held, that as the variance could have been cured by amendment in the court below, the Supreme Court will, on appeal, regard the amendment as having been made.

APPEAL from the *La Grange* Circuit Court.

GREGORY, J.—*Shank* sued the appellant, in the court below, on a promissory note. The complaint avers that the defendants, by their note, a copy of which is filed herewith, promised to pay the plaintiff \$136 20. The note is payable to *Horace Lewis, or bearer*. The defendants answered in two paragraphs: 1. That they admit the making of the note set up in the complaint, and that the same is still due and unpaid, but that the plaintiff is not the real party in interest; that the note, with other property, was delivered to *Shank* by one *Horace Lewis*, for the sole purpose of being used by *Shank* in the payment of any judgment that might be recovered against *Henry Lewis and others*, in favor of *Smith & Barnes*, in the *La Grange* Common Pleas, and when the judgment (if any was recovered) and the costs were paid, that then *Shank* was to deliver the balance to *James M. Flagg*; that the other property received by *Shank* from *Lewis* has paid the judgment recovered by *Smith & Barnes*,

except the costs, amounting to some \$25, which sum is brought into court, and tendered to the plaintiff. 2. That the defendants have paid and satisfied the note, except \$26, to *Flagg*, and they bring into court that sum to pay *Shank*, or as the court might direct. Reply, general denial.

Trial by the court; finding for the plaintiff; motion for a new trial overruled, and judgment.

At the proper time, a motion was made by the defendants to continue the cause, which was overruled. The affidavit for the continuance was made by *Flagg*, who swears that he is the attorney of record for the defendants, and is acquainted with the facts; that, as he verily believes, *Horace Lewis*, and a son of said *Horace*, whose name is, as affiant believes, *James*, are material witnesses for the defendants; that said *Horace* and *James Lewis* reside, as affiant is informed and believes, in *Minnesota*, but in what town affiant is unable to say; that they resided and were, as affiant believes, in said State at the commencement of this action, and ever since; that since the commencement of the action, not knowing the exact place of residence of said *Horace* and *James*, defendants have been unable to obtain the testimony of said witnesses in time to use it on the trial of this action at the present term; that they expect to prove by said witnesses that the note sued on is not the property of the plaintiff; that it was delivered to him by *Horace Lewis*, for the purpose of being used in the payment of any judgment which *Smith & Barnes* might obtain against *Henry Lewis & Co.*, in the Court of Common Pleas of *La Grange County, Indiana*, and after paying the judgment, the remainder of said property, and this note, were to be handed over to *James M. Flagg*; that the note and other property, so delivered to *Shank* by *Lewis*, were delivered for that purpose, and no other, and not to vest the ownership of the note, or other property, in *Shank*; that he believes said facts to be true, and that he knows of no other witness by whom the said facts can be proved, whose testimony can be as readily procured; that he believes the

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testimony of said witnesses can be procured by the next term, and that this affidavit is not made for delay.

The reasons assigned for the new trial are: 1. That the finding of the court is contrary to the evidence. 2. That the court erred in overruling the defendant's motion for a continuance.

The evidence is in the record, and is as follows: "The plaintiff, to support the issues on his part, offered and read in evidence the note and the indorsement thereon, in the complaint mentioned, in these words:

"\$186 20.

Lima, November 9th, 1861.

Nine months after date, for value received, we, or either of us, promise to pay *Horace Lewis*, or bearer, one hundred and thirty-six dollars and twenty cents, with interest, without the benefit of the valuation laws.

[Signed,]

JAMES MCKINLAY,
PETER MCKINLAY,
A. MCKINLAY."

Indorsed: "*Horace Lewis*."

This was all the evidence.

By the pleadings, the note was admitted, and the plaintiff had no evidence to offer. The burden of proof was with the defendants; they offered no testimony, therefore, the court below committed no error in overruling the motion for a new trial, so far as the first reason assigned is concerned.

It remains to inquire whether the court erred in overruling the motion of the defendants for a continuance.

It is urged that *Flagg* is a competent witness, and that he swears that he is acquainted with the facts, but, taking the affidavit altogether, it is clear that *Flagg's* acquaintance with the facts is not of the kind that would enable him to state them as a witness, but was only from information and belief. But there is a want of diligence on the part of the defendants. The suit was commenced on the 23d of

December, 1862, the term commenced on the 23d of *March* following, and the affidavit was made on the 31st. The affidavit wholly fails to show what steps, if any, were taken to ascertain the whereabouts of the absent witnesses.

The variance between the note and complaint could have been cured by amendment in the court below, and this court will, on appeal, regard the amendment as having been made. 2 G. & H., § 580, p. 278.

The judgment is affirmed, with 1 per cent. damages, and costs.

J. M. Flagg, for appellants.

A. Ellison, for appellee.

COX v. THE STATE.

APPEAL from the *Clay* Common Pleas.

ELLIOTT, C. J.—*Cox*, the appellant, was convicted of an assault and battery on the body of *Peter Wagner*, and fined \$50 and costs. The only question in the case is as to the sufficiency of the evidence to sustain the finding and judgment of the court below. The evidence is made a part of the record by a bill of exceptions. The cause was tried by the court, by agreement of the parties.

From the evidence, it appears that *Cox* kept a grocery, and retailed intoxicating liquors. *Wagner* went to *Cox's* on *Sunday*, and, after drinking, as he testifies, three glasses of liquor, dunned *Cox* for money which the latter owed him, but refused to pay. A quarrel ensued, when *Cox* ordered *Wagner* to leave his house, which he did, going outside of the inclosure into the public street, and there, probably, bantered *Cox* to come into the street and fight him. *Mrs. Cox*, the wife of the defendant, had become excited in the quarrel, by *Wagner* charging her with dishonesty. She procured an unshaved ax-handle, and followed *Wagner*, and

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struck at him with it across the fence. *Wagner* caught the bludgeon, and wrested it from her. By this time, *Cox* had also come up, and at once engaged in the fight; he got the bludgeon from *Wagner*, and struck him two or three blows with it, the last one of which struck him across the head, from which *Wagner* fell to the ground senseless. The blow was a very severe one, inflicting *serious* and probably lasting injury.

The evidence of *Wagner* establishes a clear case of an unmitigated assault and battery. Two other witnesses, females, were also present, and saw most of the occurrence. There is some conflict between their statements and those of *Wagner*, but from their statements, alone, it is evident that the fight and injury to *Wagner* resulted from his being followed by *Cox* and his wife, and attacked after he had left *Cox's* premises.

The court that tried the case had full opportunity of judging of the facts, and of the credibility of the witnesses, and we see no reason to disturb the finding.

The judgment is affirmed, with costs.

Williamson & *Daggy*, for appellant.

MERRYMAN and Another v. RYAN.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—*Ryan* sued *Merryman* and *Drake* for work and labor. Answer: denial, set-off, counter-claim, and that the work was done under a special contract of partnership. Reply, denial. Trial by jury; verdict for the plaintiff; motion for a new trial overruled, and judgment on the verdict. The defendants appeal to this court. The evidence is in the record. Several reasons are urged in support of the motion for a new trial: 1. Excessive damages. 2. The

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verdict is not sustained by the evidence, and is contrary to law. 3. Surprise. 4. Newly discovered evidence.

The plaintiff and defendants each testified. There is a conflict in the evidence. The testimony of *Ryan*, (the plaintiff,) *Whitridge*, *Hewes* and *Yohn*, sustain the verdict, whilst that of *Merryman*, *Drake*, (the defendants,) *Harding* and *House*, is in conflict therewith. The court and jury who tried the cause had a better opportunity than this court can have to judge of the weight to be given to the testimony of the witnesses, and the credit to which each was entitled by his conduct and manner of testifying. And as there is evidence to sustain the verdict, under the well recognized rule of law on the subject, we cannot interfere.

The pleadings put in issue the partnership, and this was notice to the defendants that that question would be contested on the trial, so far as the matters involved in the suit were concerned. The alleged surprise consisted in the fact that the plaintiff swore, on the trial, that the work was done before the partnership commenced. The defendants introduced evidence on the trial, on this question, and swear, in their affidavit, that they used every exertion to procure more testimony on the same subject. It cannot be said, under such circumstances, that the matter alleged was a surprise.

The newly discovered evidence was cumulative, and was not the turning point in the cause. It was proved on the trial, by *Harding* and *House*, that *Ryan* said he was in partnership with *Merryman* during the progress of the work. The appellants ask a new trial because they have found other persons who will swear to the same thing. This is no ground for a new trial. *Fox v. Reynolds*, ante, p. 46. *Bronson v. Hickman*, 10 Ind. 8.

The judgment of the court below is affirmed, with 5 per cent. damages, and costs.

J. Milner, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

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SELLER v. LINGERMAN.

24	264
194	354
24	264
126	242
24	264
143	97
24	264
156	58

SHERIFF'S SALE.—LIEN OF PURCHASER FOR PRICE PAID.—Suit by the execution debtor to set aside a sheriff's sale of real estate. At the time of the sale, the sheriff represented to bidders that the land would be sold subject to redemption by the execution defendant within one year, under the act of 1861, afterward held inoperative, by means of which representations persons were prevented from bidding, and the land was sold for one-third of its value. The court below set aside the sale, but decreed the price paid by the purchaser a lien upon the land, to be enforced by execution.

Held, that the representations made by the sheriff might well be shown to avoid the sale, taken in connection with the inadequacy of price.

Held, also, that the purchaser was entitled to recover the purchase money paid by him at the sheriff's sale, and to have his lien declared without bringing his separate action.

Held, also, that the power possessed by the court to secure to the purchaser the return of his money, by decreeing a lien for the same upon the land, would seem to render a tender of repayment by the execution defendant unnecessary.

APPEAL from the *Hendricks* Circuit Court.

HANNA, C. J.—This was a proceeding instituted by *Lingerman*, an execution defendant, to set aside a sale of his land by the sheriff. The causes alleged are: First, that due notice was not given; second, that property was sacrificed, more sold than was necessary, &c.; third, that such representations were made by the officers as prevented bidding, and caused the land to sell for less than it otherwise would have brought; that said execution defendant was not present at the sale, and the purchaser was, and had notice of said representations. Prayer, that the sale be set aside.

A demurrer was overruled to the complaint, which presents the first point.

The representations made by the sheriff in private conversations, and by his deputy during the progress of the sale, were to the effect that the land would be sold subject to be redeemed in one year, under the law of 1861,

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since held inoperative. The evidence shows that because of said representations, persons were prevented from bidding, and that the land brought but about one-third of its fair value, and that a certificate was executed to the purchaser, under the redemption law. These facts appear to bring this part of the case within that of *Ewald v. Coleman*, 19 Ind. 66.

But it is urged that the complaint was bad for not averring an offer to repay the money bid upon said sale. The proceedings were instituted after the execution of a deed by the sheriff to the purchaser. Where lands were purchased on execution, to which the execution defendant had no title, it has been held that the purchaser could recover the purchase money of the said defendant. *Muir v. Craig*, 3 Blackf. 293; 8 Blackf. 432; 9 Ind. 1; 10 *id.* 172; 15 *id.* 134. But it does not follow that the execution defendant, to get rid of an improper sale, should tender the money bid. *Banks v. Bales*, 16 Ind. 423. It is because of the wrongful act of persons other than said execution defendant that he should have said sale set aside. The purchaser was, in one sense, one of the parties to such act, and must take the consequences. We conclude, therefore, that the demurrer was rightly overruled.

The next point is made upon rulings in reference to the introduction of evidence. The court permitted the statements and representations of the sheriff and his deputy, who had the writ, both before and at the time of the sale, to go in evidence, as to the title they would sell, whether absolute or conditional. This was objected to, especially as to such as preceded the sale. The court appears to have admitted said evidence, in connection with that showing the inadequacy of the price for which the property sold, upon the issue whether the sale was fair and valid. To the same effect were the rulings on instructions given and refused, and, therefore, we shall consider together the points raised upon both rulings.

We have already indicated, by what we have said in

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regard to the sufficiency of the complaint, that, in our opinion, such representations might well be shown to avoid a sale. It only remains for us to say, that when offered in connection with inadequacy of price, or other circumstances which might convince a court or jury that a fair and honest sale has not been had, such evidence should be received. We do not see anything in the rulings, either upon the reception of evidence, or upon the question of charges to the jury, that, in this view, prejudiced the rights of the defendant.

We cannot, therefore, disturb the judgment of the court setting aside said sale.

The court rendered a judgment against the execution defendant for the amount of purchase money, and interest, paid by the said *Seller* on his bid. His answer was a general denial. A cross-error is assigned upon this branch of the judgment. Could the court, in that proceeding, and under that issue, so adjudge? The verdict of the jury was general, for the plaintiff, *Lingerman*. It is apparent that this part of the judgment is outside of the issues, and, therefore, not authorized by anything that appears in the record, and, as to so much, should be reversed.

The judgment setting aside the sale is affirmed, but as to the order or decree against *Lingerman*, for the payment of money, it is reversed, at the cost of appellant.

On a rehearing of this cause, the following opinion was delivered by

RAY, J. — A petition for a rehearing was filed by the appellant, and the petition was granted as to so much of the judgment of this Court as reversed the decree of the Circuit Court, giving to the appellant a lien upon the land sold by the sheriff, for the amount of the money bid at the sale, and paid to the sheriff as the price of the land.

This cause has been re-submitted for consideration, and we are of opinion that the judgment of the Circuit Court was correct, and should be affirmed. The finding and decree of the court upon the point under consideration was

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as follows: "The court now finds that, as alleged by the complaint, and admitted by the answer, the sum of money paid by the defendant on his bid, at said sheriff's sale, on the 3d day of *September*, 1861, was the sum of \$817, and that the interest accrued thereon, up to this date, is the sum of \$125, making in all the sum of \$939. It is, therefore, ordered, adjudged and decreed, as part of the foregoing judgment, that, within ninety days from this date, the plaintiff shall pay into this court, for the use of the defendant, the sum of \$939, so, as aforesaid, found due to him from the plaintiff, and that upon failure thereof execution therefor may be done on the property of the plaintiff."

The appellee cannot complain that the order of the Circuit Court was inequitable. The appellant's money had been applied, upon a sale of the property, to pay a judgment against the appellee, and when he comes into a court, and asks the exercise of its chancery powers to avoid the sale for errors, for which the officer of the law, alone, is responsible, he must accept the relief upon equitable terms. Nor should the appellant be required to commence an action for the recovery of the purchase money, when success in the action might not enable him to secure a lien upon the land from which his money had removed a judgment. By the decree in this case, both a multiplicity of suits is avoided, and equity is done to both parties. But the ruling rests upon authority which meets our approval. In the case of *Bunts v. Cole et al.*, 7 Blackf. 265, it was held, Mr. Justice SULLIVAN rendering the opinion, that "if a bidder at a sheriff's sale of real estate prevent others from bidding, by representations respecting the object of his bid, and then buy the property at the sale at a price much below its value, the sale is void as against public policy, and as a fraud upon the judgment debtor and his creditors. He is, however, entitled to be refunded the purchase money, which was applied to pay the complainant's debt." The court reversed the decree, with costs, and decreed that the

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sheriff's sale was void, but that *Cole* should retain a lien on the land for the money paid by him.

The case of *Banks et al. v. Bales*, 16 Ind. 423, cited by the appellee, is not in conflict with this authority. The power possessed by the court to secure to the purchaser the return of his money, by decreeing a lien for the same upon the land struck off by the sheriff, would seem to render a tender of repayment of the sum, by the execution defendant, unnecessary.

The judgment of the Circuit Court is in all things affirmed, with costs against the appellant.

A. G. Porter, W. P. Fishback, and C. C. Nave, for appellant.

H. C. Newcomb, J. Tarkington, and P. S. Kennedy, for appellee.

THE STATE v. MONDY.

RETAILING—LIQUOR LAW.—In an indictment for retailing liquor without a license, it is sufficient to charge that it was intoxicating liquor, and that the quantity sold was less than a quart, without averring the kind, or exact quantity sold.

APPEAL from the *Tippecanoe* Circuit Court.

GREGORY, J.—The defendant was indicted in the court below for retailing. It is charged that *James Mondy*, on &c., at &c., did then and there unlawfully sell intoxicating liquors, in a less quantity than a quart at a time, to *Liram Ford*, for the sum of five cents; he, the said *James Mondy*, then and there not having license to sell intoxicating liquor by less quantity than a quart at a time. On motion of the appellee, the Circuit Court quashed the indictment, and the State appeals.

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The objection urged is that the kind and precise quantity of the liquor sold are not stated. This is not necessary. To constitute a sale, within the meaning of the act of 1859, it is only necessary that some quantity, less than a quart at a time, be sold for some price. It is urged that to charge that a less quantity than a quart was sold, is stating a conclusion of law, and not a fact, and the case of *Brutton v. The State*, 4 Ind. 601, and *Divine v. The State*, *id.* 240, are cited in support of this position. In the latter case, the indictment failed to allege a price for which the liquor was sold; in the former, neither the price nor precise quantity is stated. This court held that the averment of a sale, under such circumstances, is a conclusion of law. This does not cover the case in judgment, and we are not inclined to extend the authority of these cases further than the points ruled. The statute requires no greater degree of certainty in criminal than in civil pleadings, (*M'Cool v. The State*, 23 Ind. 127.) and it would be a sufficient statement of a sale, in a civil case, to say that A B sold to C D intoxicating liquor, in a less quantity than a quart at a time, for five cents. Indeed, we cannot see how it can be said that this is stating a conclusion of law, and not a fact. The kind of liquor is wholly immaterial, so that it is intoxicating, it may be a compound.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

D. E. Williamson, Attorney General, and *F. B. Everett*, for the State.

J. M. La Rue, for appellant.

Brown v. Snavely.

BROWN v. SNAVELY.

COSTS.—Where the defendant appeals from a judgment rendered by a justice of the peace against him, in an action for a trespass to personal property, and does not reduce the judgment five dollars, he is liable to a full judgment for costs.

SAME.—Section 898 of the code, 2 G. & H. 227, which provides that in actions for damages solely, not arising out of contract, if the plaintiff does not recover five dollars damages, he shall recover no more costs than damages, &c., does not apply to such a case.

APPEAL from the *Howard* Circuit Court.

ELLIOTT, C. J.—*Snavely*, the appellee, sued the appellant for a trespass to personal property, before a justice of the peace, and recovered a judgment for the sum of three dollars and twelve cents, and costs. *Brown* appealed to the Circuit Court, where judgment was rendered against him for three dollars and costs. *Brown* moved the court to tax all the costs, except the sum of three dollars, to *Snavely*, the plaintiff below, but the court overruled the motion, and rendered a judgment against *Brown*, the defendant below, for full costs, which presents the only question made in the case.

The ruling of the Circuit Court was right. Section 70 of the justices' act, 2 G. & H. 597, provides that, "Costs shall follow judgment in the Court of Common Pleas, or Circuit Court, on appeals, with the following exceptions: *First*, if either party against whom judgment has been rendered appeal, and reduce the judgment against him five dollars or more, he shall recover his costs in the Court of Common Pleas, or Circuit Court, when the appellant appeared before the justice. *Second*, if either party in whose favor judgment has been rendered appeal, and do not recover at least five dollars more than he recovered before the justice, the appellee shall recover his costs in the Court of Common Pleas, or Circuit Court."

These are the only exceptions made by the statute. *Brown* appealed, and did not reduce the judgment against

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him five dollars. The court, therefore, was right in adjudging that the costs should follow the judgment. Section 398 of the code, 2 G. & H. 227, to which we are referred by the appellant's counsel, is not applicable to the case.

The judgment of the Circuit Court is affirmed, with 10 per cent. damages, and costs.

J. W. Robinson, for appellant.

CLARK v. DUFFEY.

STATUTE OF FRAUDS.—A took from B a chattel mortgage, which he failed to have recorded within ten days after its execution. B sold the mortgaged property to C, and took his note for the price. Subsequently, C agreed with A, orally, to surrender the property to him, if he would take up and deliver to him, C, the note given by him to B. A, in pursuance of the agreement, took up the note, and tendered it to C, who refused to surrender the property. Suit by A to recover the value of the property. *Held*, that the contract between A and C was not a contract of sale, but an agreement on the part of C to waive his claim, and allow A's mortgage to take effect upon the property, and, hence, was not within the statute of frauds.

APPEAL from the *Decatur* Circuit Court.

RAY, J.—The appellant sued the appellee before a justice of the peace. In his complaint, he averred that on the 4th day of *October*, 1861, one *Clemens Bymer* was indebted to him in the sum of \$110, due on or before the 1st day of *January*, 1863, and that to secure the note, *Bymer* executed a mortgage on two mares and a wagon, then owned by *Bymer*; that the appellant neglected to record his mortgage within ten days, and that *Bymer* afterward, without the knowledge or consent of appellant, disposed of one of the mares to a person unknown to appellant, who conveyed it away beyond the reach of appellant. That afterward, *Bymer* secretly, and without appellant's knowledge, sold

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and delivered the remaining mare and the wagon to the appellee, and took his note for the purchase money, the sum of \$70, dated *December 20th*, 1862, and due nine months after its date; that *Bymer* is insolvent, and that he made the sale to cheat and defraud the appellant of his mortgage debt, and that the mare and wagon, so sold to the appellee, were of the value of \$125. That the appellee, about the time the mortgage debt matured, to-wit: on the 1st day of *January*, 1863, contracted and agreed with the appellant, that if the appellant would take up the note of appellee, in the hands of *Bymer*, the appellee would, in consideration thereof, surrender to the appellant the said mare and wagon; that the appellant, in pursuance of said contract, did take up said note of the appellee, in the hands of *Bymer*, for said sum of \$70, and, in consideration that said *Bymer* would make the surrender aforesaid, relinquished and discharged said mortgage debt, and tendered the \$70 note to the appellee, on the 1st day of *January*, 1863, and demanded the mare and wagon, but he refused to deliver the same according to the terms of the contract, and retained the same.

The appellant brought the note into court, and demanded judgment for the value of the mare and wagon, \$125.

The appellee moved to dismiss the suit, for the reason that it did not state facts sufficient to constitute a cause of action. The justice overruled the motion, and the appellee answered in two paragraphs: 1st, a general denial. 2d, the statute of frauds; that the contract was for the sale of goods of over \$50 in value; that it was not in writing; that no earnest money was paid, nor any part of the property delivered.

The justice decided against the appellant.

In the Circuit Court, the appellee renewed his motion to dismiss the cause, but the court overruled the motion. The appellant then moved to strike out the second paragraph of the answer, which motion the court overruled.

The cause was then tried, and a finding had for the

defendant, and judgment was rendered upon the overruling of a motion for a new trial.

The appellant assigns as error the action of the court in overruling his motion to strike out the second paragraph of appellee's answer. That paragraph treats the transaction stated in the complaint as a sale. If it could be so regarded, we are not clear that a payment of a consideration by the appellant, in the purchase of the seventy dollar note given by the appellee, would not avoid the application of the *statute of frauds*. But however that may be, we regard the contract stated as simply an agreement, by the appellee, to waive all rights acquired by him as a purchaser without notice, and, for a certain consideration, to allow the mortgage the full force and effect upon the property that it could have in law as between the parties. The complaint alleges the payment of the consideration, and the plea of the statute of frauds constitutes no defense to the action. The motion to strike out the second paragraph of the answer should have been sustained. The evidence for the appellant sustains the averments of the complaint.

The judgment is reversed, with costs, and the court directed to sustain the motion to strike out the second paragraph of the answer of appellee.

O. B. Hord and C. Ewing, for appellant.

HALL and ANOTHER v. HOUGH.

24	273
146	597

INJUNCTION.—PRACTICE.—Where a restraining order has been granted upon a complaint duly verified by affidavit, and an amended complaint is afterward filed, the objection that the latter is not supported by affidavit cannot be raised by demurrer.

EXEMPTION.—Where property is claimed by an execution debtor as exempt from sale under executions then in the hands of the sheriff, and is set off to him as exempt, it is relieved from the lien of the executions.

Hall and Another v. Hoagh.

APPEAL from the Wells Circuit Court.

ABSTRACT.

Complaint by the appellee for an injunction, setting up in substance the following facts: That on the 21st day of October, 1856, *Boswell C. Benedict* and others obtained judgment in the Wells Common Pleas Court, against *George McDowell* and others, for the sum of \$166 83, and that *Aduah Hall*, the appellant, entered himself replevin bail on said judgment; that afterward, to-wit: on the 15th day of October, 1859, the said judgment and costs were fully paid and satisfied by the levy and sale of the property of said *Hall*; that on the 18th day of January, 1858, one *George Miller* recovered judgment in the Wells Circuit Court, against said *George McDowell*, for the sum of \$300 96; that on the 7th day of May, 1858, execution duly issued on said judgment to the sheriff, and was by him duly levied upon certain real estate, the property of said *McDowell*. *McDowell* claimed the land under the exemption act, and it was set off to him. At the time said execution, so issued in favor of *Miller*, was in the hands of said sheriff, and at the time said property was so set off to said *McDowell*, the said sheriff held an execution which was issued upon the said judgment in favor of said *B. C. Benedict* and others. Subsequently, *McDowell* mortgaged said property to *Miller*, and *Miller* assigned said mortgage debt to the plaintiff, who afterward foreclosed the mortgage, had the property sold, and bought it in on execution. That on the 28th day of October, 1861, the said defendant, *Hall*, caused an execution to issue on said judgment, in favor of *B. C. Benedict* and others, which was placed in the hands of the sheriff, *DeHasen*, and was by him levied upon said real estate, and the same was advertised for sale, &c.

Prayer, that the court grant an injunction restraining the further proceedings of defendant.

Copies of the records of the judgments above mentioned,

upon which plaintiff bases his title, are not set out in the complaint, nor is the complaint supported by affidavit.

Demurrer to the complaint for the following grounds of objection: 1. The complaint does not state sufficient facts. 2. The complaint is not supported by affidavit. Demurrer overruled; motion in arrest of judgment overruled, and defendant excepts. Judgment for plaintiff.

RAY, J.—The objection that the amended complaint, filed by leave of court after the restraining order had been granted upon a properly verified complaint, was not supported by affidavit, cannot be raised by demurrer. *Denny, Adm'r, v. Moore*, 13 Ind. 418.

It is insisted that the complaint is defective in not containing copies of the judgments, executions, returns, and the sheriff's deed. To require this would be simply requiring the proof proper to be introduced upon the trial of the issues to be made part of the complaint.

The facts stated in the complaint are sufficient, if true, to entitle the appellee to the relief asked. While the sheriff held the executions issued upon the judgment in favor of *Benedict* and others, and upon the judgment in favor of *Miller*, the execution defendant notified the said sheriff that he claimed the property as exempt from execution, and the same was thereupon set off to him. This relieved it from the lien of either execution in the sheriff's hands, and the subsequent proceedings vested the title in appellee. The demurrer was, therefore, properly overruled.

The judgment is affirmed.

N. Burwell, D. Stulebaker, J. E. McDonald and A. L. Roache, for appellants.

W. H. Coombs, for appellee.

Agard v. Hawks and Another.

AGARD v. HAWKS and Another.

APPEAL from the *Elkhart* Circuit Court.

RAY, J.—In this case the judgment was entered upon a power of attorney. It is insisted as error, and the point is presented in this court without any motion having been made in the court below, that no complaint was filed with the power of attorney. The statement of the intention to hold a mechanic's lien upon the premises described, on account of certain labor performed by appellees for appellant, with the amount of indebtedness, and when due, is made a part of the power of attorney, and contains, with the averment in that instrument, all that is required in such cases. *Veach v. Pierce*, 6 Ind. 48. *Gambia v. Howe*, 8 Blackf. 133.

The remaining objection taken by the appellant is, that although the affidavit attached to the power of attorney is duly signed by the appellant, yet the notary has failed to sign his name to the certificate. The record, however, does show affirmatively that "proof was made to the satisfaction of the court of the due execution of said power of attorney," and that the affidavit of the appellant was filed. Had the proper motion been made below, the court would, doubtless, have corrected what would seem, from the record, to have been a mere clerical omission.

The statement of the record is, however, conclusive, and the judgment is affirmed, with 10 per cent. damages.

R. Lowry, for appellant.

J. H. Baker, for appellees.

YATER and Others v. MULLEN.

24	977
138	582

PRACTICE—REHEARING.—It is too late to present a question for the first time in the Supreme Court, on a petition for a rehearing.

FIXTURES.—A erected a mill upon land owned by B, under a parol contract that if B should pay off a certain judgment which was a lien on the land, and should then convey to A an undivided half of the land, he, B, should become the owner of one-half of the mill. Until the judgment was paid mill was to remain the individual property of A. B failed to pay the judgment, and the land was sold upon an execution issued thereon.

Held, that after the sale of the land on the execution, the mill, though standing upon the land, was the personal property of A, who had a perfect right to remove it from the land.

Held, also, that A had acquired no interest in the land as a purchaser, and his right to remove the mill did not depend upon the law in relation to fixtures erected by him as tenant, but upon the contract, by virtue of which he acted.

WITNESS—PARTIES.—Now that parties are permitted to testify in their own behalf, they must be held to the same prompt attendance to give their testimony that the law requires of other witnesses.

TROVER—MEASURE OF DAMAGES.—The measure of damages, in an action for the conversion of personal property, is the value of the property at the time of the conversion.

APPEAL from the *Ripley* Circuit Court.*On Petition for Rehearing.*

FRAZER, J.—Since the opinion in this case was reported, 23 Ind. 562, other counsel for the appellants present an application for rehearing, and in support of it an elaborate brief, devoted mainly to a question not presented at all on the hearing, and, therefore, not then considered or discussed by us. It is, by the well settled practice of this court, too late to present a question for the first time on a petition for rehearing, and in consenting to consider that question, in the present instance, we do not mean to make an innovation which shall be regarded as a precedent in future cases.

The new question alluded to is, whether, upon the evidence, the plaintiff below was entitled to recover at

Yater and Others v. Mullen.

all. It is insisted that he was not, because the plaintiff, as to the land, was either a purchaser, or a tenant of the owner, and as such built the mill; that if as purchaser he built it, it would constitute part of the realty, and pass by the sheriff's sale; if as tenant, then the right to remove the mill, as a fixture, would be lost, unless exercised before the termination of the tenancy.

The legal propositions, in the argument thus stated, are not applicable to the facts of this case. The contract under which the mill was built is stated in the reported opinion in the case, 23 Ind. *supra*, and it will be seen thereby that there was an express contract, by virtue of which the mill was the sole property of the builder until the judgment should be paid off by *Alex. J. Mullen*. This was never done by him, in consequence of which he never acquired any interest in the mill; and no sale of the mill, by virtue of an execution against him, (which, however, the evidence showed was not even attempted,) could give the purchaser any title to it whatever. After the sale of the land, by the sheriff, to satisfy the judgment, the mill, though still standing upon the land, was *Bernard F. Mullen's* personal property, and he had as perfect a right to remove it afterward, as he would have had to remove his horses and wagons, if they had then been upon the land. By the contract, he had no right to remove the mill until after the sheriff's sale. *A. J. Mullen* could have paid off the judgment on the last moment before the land was struck off by the sheriff, and thus entitled himself to ownership in the mill. Then, for the first time, it would have been part of the realty. This was the contract, but it was at the option of *A. J. Mullen* to perform this condition, or not. Until he did, *B. F. Mullen* had no interest in the land as purchaser, and his right to remove the mill did not depend at all upon the law in relation to fixtures erected by him as tenant, but upon the contract by virtue of which he had acted, and, necessarily incident to which, he had, under the facts of the case, the right to remove it after the sale.

As the argument in support of the petition for a rehearing calls upon us to re-examine our decision as to the ruling of the court below, refusing a new trial, we avail ourselves of the occasion to say something more upon that question.

One of the appellants was at *Indianapolis* when the trial began, and, but for a railroad accident, he would have arrived at court in time to testify, but the accident prevented it. Whether his business at *Indianapolis* was urgent, or not, is not stated, and the law requires us to indulge such presumptions of fact as will sustain the ruling of the court below. He would have testified that the property had not been demanded of him, and that its value was only \$800. The evidence controverting the demand we cannot say would probably have changed the result, as there was other evidence tending to show a conversion of the property, that the defendants had taken possession of it, operated it, and claimed it as their own. His evidence as to the value of the property would have been cumulative only.

Public or social obligations, or the demands of private business even, might appear to be, if stated, so urgent and imperative as to justify a witness in being absent at the commencement of a trial which he is subpoenaed to attend. But without such excuse, the witness' duty is to be present before the trial begins, and if he fails he is in contempt, and it is not sufficient that he has intended and arranged to be present in time to testify. To so hold, would be to put every suitor's cause in peril, or drive him to seek delay, for he could not know that he could safely go to trial. Now that parties can be witnesses, there is no rule, consistent with that speedy administration of justice which the constitution requires, short of holding such parties, at their peril, to the same prompt attendance to give their evidence which the law has, time out of mind, required of other witnesses. And upon their application to be relieved from the consequences of their absence, it is surely not a harsh requirement that they shall show to the

Bell v. Hewitt's Executors.

court the facts which rendered it necessary for them to be absent when the trial began.

The zeal and earnestness with which this application is pressed affords strong assurance that the appellants, as well as their counsel, are fully impressed with the belief that the judgment below does them injustice. We are compelled to look only to the record as it is presented to us, and apply to it the settled rules of the law. We have done this with as much care as could be asked, and the result is, that, in our opinion, the petition ought to be overruled.

There is, however, we find to our surprise, a *dictum* in the opinion formerly pronounced, which we hasten to correct. The basis of the measure of damages, in such a case, is the value of the property at the time of conversion, and not, as stated, at the commencement of the suit.

M. M. Ray, J. W. Gordon, A. G. Porter and W. P. Fishback, for appellants.

S. Major, for appellee.

BELL v. HEWITT'S Executors.

CONTRACT.—WILL.—A agreed orally with B, in consideration that the latter would continue to live with him as a laborer on his farm, that, in addition to the usual wages for such labor, he would leave to B, in his last will, the sum of \$500. Suit by B against the executors of A, alleging that he had continued to live with, and labor for, A, up to the time of his death, and that A had failed to make the promised provision in his will.

Held, that the agreement was not affected by the statute of frauds, 1st, because it had been performed by B; and 2d, because it was such an agreement as might have been performed within one year, by the death of A.

Held, also, that an action will lie upon the contract against the executors.

APPEAL from the *Union Common Pleas*.

ELLIOTT, C. J.—Suit by the appellant against the

appellees, as executors of *William Hewitt*, deceased, on an alleged contract between the appellant and *William Hewitt*, in his life-time. The court below sustained a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. Final judgment was rendered against the plaintiff for costs, from which he appeals.

The ruling of the court in sustaining the demurrer to the complaint raises the only question presented to this court.

The complaint alleges that, on the — day of *October*, 1861, the plaintiff and the said *William Hewitt* entered into an agreement, by which *Hewitt* promised that if the plaintiff would continue to live with him as a work hand on his farm, and work and labor for him, he, the said *Hewitt*, in addition to the usual wages allowed to work hands, would leave to him, said plaintiff, at his, said *Hewitt's*, death, in his last will, the sum of \$500. That the plaintiff, in accordance with said contract and agreement, continued to work and labor on the farm of said *Hewitt*, in *Union* county, up to and until the time of the death of said *Hewitt*, in *May*, 1864. That the last will of said *Hewitt* has been duly probated in the Common Pleas Court of *Union* county, and that the defendants are the executors thereof; but that there was no legacy, or provision therein, for the payment to plaintiff of said sum of \$500, or any other sum, and that the said defendants, as the executors of said *Hewitt*, deceased, refuse to pay to, or allow, the plaintiff the said sum of \$500. The complaint prays judgment for \$500. A memorandum in writing is made a part of the complaint. It is not signed by either of the parties, but is alleged to be in the handwriting of said *Hewitt*. It is as follows: "The wages that *Jon. Bell* is as high as any body would give him for a year, and he is among his friends, living with his uncle and aunt; his washing and mending are done; he has a horse to ride out when he wishes, and a kind family. I promise, further, to leave

Bell v. Hewitt's Executors.

him at my death, in my last will and testament, the sum of \$500."

This memorandum, not being signed by *Hewitt*, leaves the agreement resting in parol. Under proper proof, it might, perhaps, be referred to on the trial, as evidence of the terms of the promise. The alleged agreement, having been performed by the plaintiff, is not affected by the statute of frauds. It does not come within the fifth subdivision of that statute, (1 G. & H. 350,) for the reason that, by the death of *Hewitt*, it might have been performed within a year. *Hill et al. v. Jamieson*, 16 Ind. 125; *Wilson v. Ray*, 13 *id.* 1. The allegations in the complaint show a definite contract between the parties, and a valid consideration for the promise of *Hewitt*.

The parties were capable to contract, and must be presumed to have determined the adequacy of the consideration for themselves. *Duffy v. Shockey*, 11 Ind. 70, and authorities there cited.

Under the averments in the complaint, the services of the plaintiff were not performed under a mere expectancy that *Hewitt* would leave him a legacy in his will, but under an express promise that *Hewitt* would leave him, by his last will, the sum of \$500; and having failed to do so, we do not see why an action will not lie against his executors to recover the amount. *Jacobson v. The Exs. of Le Grange*, 3 John. 199; *Patterson v. Patterson*, 13 John. 379.

We think the court erred in sustaining the demurrer to the complaint, and the judgment must, therefore, be reversed.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint.

J. S. Reid, for appellant.

J. F. Gardner, for appellees.

The Indianapolis and Cincinnati Railroad Company v. McKinney.

THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY v.
McKINNEY.

24	283
161	186

RAILROADS.—FENCES.—Where an animal passes upon a railroad track at the crossing of a public street or highway, or other place where, from any cause, it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the train.

SAME.—The fact that a public highway runs along the side of a railroad track does not, of itself, show a valid reason why a fence could not be maintained between the highway and the track, but rather shows the stronger reason why the railroad should be fenced.

SAME.—The owner of an animal killed or injured by the cars of a railroad company may recover therefor, if the road is not fenced, though he be not an adjoining proprietor and has been guilty of negligence in permitting the animal to stray upon the railroad.

APPEAL from the *Dearborn* Circuit Court.

ELLIOTT, C. J.—*McKinney* sued, and recovered a judgment against, the *Indianapolis & Cincinnati Railroad Company*, for the value of a mule killed by the locomotive and train of the defendant, while being run on said road, in *Dearborn* county, the railroad not being fenced in as required by the statute. The defendant answered in three paragraphs, to the *third* of which the court sustained a demurrer, which presents the first question raised by the appellant.

That paragraph alleges that along the west side of said railroad there is a public highway, or turnpike road, leading from *Laurenceburgh* to *Brookville*, and that, at the time of killing said mule, the plaintiff permitted it to escape from his inclosure, adjoining to said public highway, and that it went from said highway upon the defendant's railroad track, and was there struck by the defendant's train; "Wherefore, the defendant says that said mule was killed by the carelessness and negligence of the plaintiff, and not by any fault of the defendant."

Section 5 of the act of 1863, under which this suit is brought, provides that, "On the hearing of any such cause, the court or jury trying the same shall give judgment

The Indianapolis and Cincinnati Railroad Company v. McKinney.

for the plaintiff, or plaintiffs, for the value of the animal or animals killed, or injury done, without regard to the question whether such killing, or injury was the result of wilful misconduct or negligence, or the result of unavoidable accident." Acts of 1863, p. 26. And the seventh section of the same act provides that, "This act shall not apply to any railroad securely fenced in, and such fence properly maintained by said company."

The answer under consideration contains no averment that the railroad was securely fenced. Nor is it aided by the averment that a public highway runs along the west side of the railroad, and that the mule passed from said highway upon the track, and was thereby killed.

This court has repeatedly held that if the animal passes upon the railroad track at the crossing of a public street, or highway, or other place where, from any cause, it would be improper that the railroad should be fenced in, the company is not liable, except for negligence, or the misconduct of those having charge of the train. But this case is not brought within that rule by the averments in the third paragraph of the answer.

The fact that a public highway runs along the west side of the railroad does not, of itself, show a valid reason why a fence could not properly be run between the highway and railroad, but, on the contrary, would seem rather to show the greater necessity that the railroad should be fenced at such place.

It is insisted by the appellant's counsel that the statute was only intended as a protection to the owner of animals through whose land the railroad passes, and not to persons who reside at a distance from the railroad, and who negligently permit their animals to stray from home and get upon the railroad track. And we are urged to review the former decisions of this court upon that point.

The act of 1853 contained, substantially, if not literally, the same provision on this subject as the act of 1863. Under the former act, this court held, in the case of the

The Indianapolis and Cincinnati Railroad Company v. McKinney.

Indianapolis & Cincinnati Railroad Company v. Townsend, 10 Ind. 38, decided at the November Term, 1857, that, though the owner of the animal is not an adjoining proprietor, and is guilty of negligence in permitting it to stray upon the railroad, and it is thereby killed, he may recover, if the company has failed to comply with the requirements of the statute. This decision was followed in numerous other cases, prior to 1863, when the legislature re-enacted the same provision, with a knowledge of the construction that had been given to it by repeated decisions of this court. We must, therefore, presume that the legislature, in re-enacting the provision, sanctioned and adopted that construction. Under these circumstances, we think the question should be regarded as finally settled, and no longer open to discussion. See, also, *I. & C. R. R. Co. v. Guard*, ante, p. 222.

It is further insisted that the judgment below is erroneous, for the reason that the complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in not overruling the demurrer to the answer, and sustaining it to the complaint.

The first objection urged to the complaint is that it does not show that the mule was killed in *Dearborn* county, where the suit was brought. In this, however, the appellant's counsel is in error. The complaint avers that the defendant is indebted to the plaintiff, "in the sum of two hundred and sixty dollars, for a brown mule, killed by the cars and locomotive of the defendant, run," &c., "and passing through the said county of *Dearborn*, State of *Indiana*, at said county of *Dearborn*." The latter words, "*at said county of Dearborn*," clearly refer to the place where the act complained of occurred, and are an unequivocal averment of the venue.

It is further objected to the complaint that it does not sufficiently aver that the railroad was not securely fenced in. The averment in the complaint on this point is as follows,

●

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viz: "The road of said defendant not being fenced, at the place where the said mule was killed." This is, in effect, an averment that the road was not fenced in at all, at the particular place named. If *no* fence existed at such place, the road was certainly not *securely* fenced at that point, and, in such case, it would be impossible to state the kind of fence, as the counsel urges should be done, as none of any kind existed. We think the averment is sufficient. We find nothing in the record to justify a reversal of the judgment below.

The judgment is affirmed, with 8 per cent. damages, and costs.

D. S. Major, for appellant.

W. S. Holman, for appellee.

24	296
132	551
84	288
184	539
136	589
24	286
141	8

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24	286
160	603

INFORMATION.—In an information in the Court of Common Pleas for murder, the prosecuting attorney informed the court that A B was in custody, and confined in jail, on charge of a felony, without indictment, &c., "said charge being described as follows:" A description of the crime of murder in the second degree followed, but the information contained no direct averment that the defendant had committed the crime.

Held, that the information was bad.

TOWN—CITY.—The word *town* is generic, comprehending city, and hence the law which makes shooting in a "town or village" a misdemeanor applies to cities.

APPEAL from the *Marion* Common Pleas.

FRAZER, J.—The information in this case was as follows: "*W. W. Woollen*, district attorney, &c., informs the *Marion* Court of Common Pleas that *Patrick Flinn*, who now is in custody, and confined in the jail of *Marion* county and State of *Indiana*, upon a charge of felony hereinafter described, and who has not been indicted by the grand jury

Flinn v. The State.

of Marion county upon said charge, said charge being described as follows, to-wit:—At Marion county, in the State of Indiana, on the 19th day of May, 1863, said Patrick Flinn did unlawfully, feloniously, purposely, and maliciously, but without premeditation, kill and murder George C. Halford, by then and there shooting said George C. Halford, in and upon the head, with a certain pistol, loaded with gunpowder and leaden balls, then and there had and held by said Patrick Flinn, contrary to the statute, &c.”

A motion to quash the information was overruled. It should have been sustained. The pleading merely alleges that Flinn was in custody upon a certain charge, and that he had not been indicted therefor. It ought, in addition, to have alleged directly, in proper form, that he did the things wherewith he had been so charged.

The evidence disclosed that Flinn, shooting at a tree, in a public park in the city of Indianapolis, missed the tree, and accidentally struck Halford, causing his death. If this shooting in the city was an unlawful act, it would, of course, constitute an important element in the case. Upon that question, the court instructed the jury that such shooting was a violation of section 8 of an act defining certain misdemeanors. 2 G. & H. 645. That section makes such shooting in a “town or village” a misdemeanor. It is urged that, Indianapolis being a city, the instruction was wrong. We are not of that opinion. The term “town” is generic, comprehending cities. 1 Black. Com. by Chitty, 81-2.

The judgment is reversed, and the cause remanded, with directions to the court below to set aside all its proceedings subsequent to the motion to quash, and to sustain that motion. The warden of the state prison will be directed to return the prisoner, &c.

A. G. Porter, B. Harrison, W. P. Fishback, and B. K. Elliott, for appellant.

W. W. Leathers and G. Carter, for the State.

Flinn v. The State.

viz: "The road of said defendant not being fenced, at the place where the said mule was killed." This is, in effect, an averment that the road was not fenced in at all, at the particular place named. If no fence existed at such place, the road was certainly not *securely* fenced at that point, and, in such case, it would be impossible to state the kind of fence, as the counsel urges should be done, as none of any kind existed. We think the averment is sufficient. We find nothing in the record to justify a reversal of the judgment below.

The judgment is affirmed, with 8 per cent. damages, and costs.

D. S. Major, for appellant.

W. S. Holman, for appellee.

94	286
132	56
94	286
184	530
126	580
24	286
141	8

FLINN v. THE STATE.

24	286
169	603

INFORMATION.—In an information in the Court of Common Pleas for murder, the prosecuting attorney informed the court that A B was in custody, and confined in jail, on charge of a felony, without indictment, &c., "said charge being described as follows:" A description of the crime of murder in the second degree followed, but the information contained no direct averment that the defendant had committed the crime.

Held, that the information was bad.

Town—City.—The word *town* is generic, comprehending city, and hence the law which makes shooting in a "town or village" a misdemeanor applies to cities.

APPEAL from the *Marion* Common Pleas.

FRAZER, J.—The information in this case was as follows: "W. W. Woollen, district attorney, &c., informs the *Marion* Court of Common Pleas that *Patrick Flinn*, who now is in custody, and confined in the jail of *Marion* county and State of *Indiana*, upon a charge of felony hereinafter described, and who has not been indicted by the grand jury

Flinn v. The State.

of *Marion* county upon said charge, said charge being described as follows, to-wit:—At *Marion* county, in the State of *Indiana*, on the 19th day of *May*, 1868, said *Patrick Flinn* did unlawfully, feloniously, purposely, and maliciously, but without premeditation, kill and murder *George C. Halford*, by then and there shooting said *George C. Halford*, in and upon the head, with a certain pistol, loaded with gunpowder and leaden balls, then and there had and held by said *Patrick Flinn*, contrary to the statute, &c.”

A motion to quash the information was overruled. It should have been sustained. The pleading merely alleges that *Flinn* was in custody upon a certain charge, and that he had not been indicted therefor. It ought, in addition, to have alleged directly, in proper form, that he did the things wherewith he had been so charged.

The evidence disclosed that *Flinn*, shooting at a tree, in a public park in the city of *Indianapolis*, missed the tree, and accidentally struck *Halford*, causing his death. If this shooting in the city was an unlawful act, it would, of course, constitute an important element in the case. Upon that question, the court instructed the jury that such shooting was a violation of section 3 of an act defining certain misdemeanors. 2 G. & H. 645. That section makes such shooting in a “town or village” a misdemeanor. It is urged that, *Indianapolis* being a city, the instruction was wrong. We are not of that opinion. The term “town” is generic, comprehending cities. 1 Black. Com. by *Chitty*, 81-2.

The judgment is reversed, and the cause remanded, with directions to the court below to set aside all its proceedings subsequent to the motion to quash, and to sustain that motion. The warden of the state prison will be directed to return the prisoner, &c.

A. G. Porter, *B. Harrison*, *W. P. Fishback*, and *B. K. Elliott*, for appellant.

W. W. Leathers and *G. Carter*, for the State.

Flinn v. The State.

viz: "The road of said defendant not being fenced, at the place where the said mule was killed." This is, in effect, an averment that the road was not fenced in at all, at the particular place named. If *no* fence existed at such place, the road was certainly not *securely* fenced at that point, and, in such case, it would be impossible to state the kind of fence, as the counsel urges should be done, as none of any kind existed. We think the averment is sufficient. We find nothing in the record to justify a reversal of the judgment below.

The judgment is affirmed, with 3 per cent. damages, and costs.

D. S. Major, for appellant.

W. S. Holman, for appellee.

34	286
132	55
24	286
124	530
126	569
24	286
141	8

FLINN v. THE STATE.

24 286
169 603

INFORMATION.—In an information in the Court of Common Pleas for murder, the prosecuting attorney informed the court that A B was in custody, and confined in jail, on charge of a felony, without indictment, &c., "said charge being described as follows:" A description of the crime of murder in the second degree followed, but the information contained no direct averment that the defendant had committed the crime.

Held, that the information was bad.

TOWN—CITY.—The word *town* is generic, comprehending city, and hence the law which makes shooting in a "town or village" a misdemeanor applies to cities.

APPEAL from the *Marion* Common Pleas.

FRAZER, J.—The information in this case was as follows: "*W. W. Woollen*, district attorney, &c., informs the *Marion* Court of Common Pleas that *Patrick Flinn*, who now is in custody, and confined in the jail of *Marion* county and State of *Indiana*, upon a charge of felony hereinafter described, and who has not been indicted by the grand jury

Flinn v. The State.

of Marion county upon said charge, said charge being described as follows, to-wit:—At Marion county, in the State of Indiana, on the 19th day of May, 1863, said Patrick Flinn did unlawfully, feloniously, purposely, and maliciously, but without premeditation, kill and murder *George C. Halford*, by then and there shooting said *George C. Halford*, in and upon the head, with a certain pistol, loaded with gunpowder and leaden balls, then and there had and held by said Patrick Flinn, contrary to the statute, &c.”

A motion to quash the information was overruled. It should have been sustained. The pleading merely alleges that Flinn was in custody upon a certain charge, and that he had not been indicted therefor. It ought, in addition, to have alleged directly, in proper form, that he did the things wherewith he had been so charged.

The evidence disclosed that Flinn, shooting at a tree, in a public park in the city of Indianapolis, missed the tree, and accidentally struck Halford, causing his death. If this shooting in the city was an unlawful act, it would, of course, constitute an important element in the case. Upon that question, the court instructed the jury that such shooting was a violation of section 3 of an act defining certain misdemeanors. 2 G. & H. 645. That section makes such shooting in a “town or village” a misdemeanor. It is urged that, Indianapolis being a city, the instruction was wrong. We are not of that opinion. The term “town” is generic, comprehending cities. 1 Black. Com. by Chitty, 81-2.

The judgment is reversed, and the cause remanded, with directions to the court below to set aside all its proceedings subsequent to the motion to quash, and to sustain that motion. The warden of the state prison will be directed to return the prisoner, &c.

A. G. Porter, B. Harrison, W. P. Fishback, and B. K. Elliott, for appellant.

W. W. Leathers and G. Carter, for the State.

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145	307
24	288
150	588

HAWKINS v. THE STATE, on the relation of READ, Auditor of Daviess County.

RECOGNIZANCE, SUITS ON.—In action upon a forfeited recognizance, given for the appearance of the accused to answer a criminal charge, no *relator* should be named in the complaint, but the action should be prosecuted in the name of the State of Indiana.

SAME.—Where such an action is brought on the relation of the Auditor of the county, the Auditor's name may be stricken out, on motion, as surplusage.

SAME—JURISDICTION.—The Court of Common Pleas has jurisdiction of an action brought upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the defendant to answer a charge of felony in the Circuit Court.

JUSTICE OF THE PEACE—FELONIES.—In cases of felony, justices of the peace have no power to try the accused, in any legal sense, but only to examine and hold to bail, or commit in default of bail.

RECOGNIZANCE.—In a suit upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the accused to answer a charge of felony in the Circuit Court, the facts showing the authority of the justice to take the recognizance must be shown.

APPEAL from the Daviess Common Pleas.

FRAZER, J.—This was a suit upon a forfeited recognizance, prosecuted in the name of the State of Indiana, on the relation of *Richard N. Read*, Auditor of Daviess county. A demurrer to the complaint by the appellant, who was surety on the recognizance, was overruled. Causes of demurrer were assigned, presenting several questions, which are pressed upon our consideration.

It is claimed that the auditor was not the proper relator, but that the suit should have been on the relation of either the prosecuting attorney or the county treasurer. We think that there is nothing whatever in the question. We know of no law in this State requiring that such a suit should be on the relation of anybody. The State of Indiana, to whom the recognizance is payable, is competent to sue. The law makes it the duty of the prosecuting attorney to prosecute the suit. This is one of his official duties. 2 G. & H., § 48, p. 898. The money realized

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thereby, when collected, becomes a part of the common school fund. Acts 1861, p. 68. We do not understand, however, that the county auditor has any authority to control the suit in any manner whatever. The law places that responsibility upon the prosecuting attorney. The recognizance is not an obligation given on account of the school fund, and is not, therefore, among those mentioned in the twelfth section of the act in relation to county auditors. 1 G & H. § 12, p. 123. We regard the insertion of the auditor's name in the complaint as surplusage, and not capable of doing any harm to the appellant, or the public. It ought to have been stricken out on motion, but the objection could not be reached by demurrer, inasmuch as the State of Indiana was the proper plaintiff, and there was, consequently, no defect of parties plaintiff.

- The complaint alleges that *Levi Hawkins* was "arrested and tried before one *Walker*, a justice of *Daviess* county, on a charge of assault and battery with intent to commit murder, and was by the justice recognized in the sum of \$300 for his appearance at the next term of the *Daviess* Circuit Court," to answer to that charge, and thereupon, with the appellant as his surety, executed the recognizance, which is set out in the complaint, and is in proper form, and which was approved by the justice; that at the next term of said court, and after the grand jury had returned an indictment against him for the offense, the principal, *Levi Hawkins*, failed to appear, and was, with his surety, called and duly defaulted, and the recognizance forfeited.

It is claimed, on behalf of the appellant, that the Court of Common Pleas had no jurisdiction of the suit. This point has been settled otherwise here, and we think correctly. *McCole v. The State*, 10 Ind. 50.

It is also urged that it does not appear from the complaint that the justice had authority to take the recognizance, inasmuch as it is not alleged that the principal was ever arrested, or adjudged guilty by the justice of, any offense, for or required by him to enter into recognizance.

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The power and jurisdiction of justices of the peace are specially conferred by statute, and they can exercise no authority not thus given. In cases of felony, they have no power to *try* the party, in any legal sense, but can only examine, and in proper cases hold to bail, or, in default of bail, commit to jail to await trial in the proper court. The defendant may, however, waive the examination. It is not necessary that any judgment of guilty should be rendered before taking bail. Should the justice deem the party guilty, his duty is merely to "hold to bail" in such sum as shall be deemed adequate. 2 G. & H., § 5, p. 637. If the party fail to enter into recognizance as required, then follows commitment to jail. The complaint before us shows everything sufficiently, unless it be that *Levi Hawkins* was held to bail by the justice. The complaint attempts to aver this in the language, "was then and there, by the aforesaid justice of the peace, *recognized* in the sum of," &c., "and thereupon executed a bond," &c. The term "*recognized*" is adequate to express this fact. There was an utter absence of evidence upon the same subject, and, indeed, none showing that the justice ever had the case before him. The motion by the appellant for a new trial should, therefore, have been sustained. Without proof showing the facts which authorized the justice to take the recognizance, the finding should have been for the appellant.

The judgment is reversed, and the cause remanded, with directions to set aside all the proceedings subsequent to the demurrer to the complaint, and then to proceed according to this opinion.

J. W. Burton, for appellant.

D. E. Williamson, Attorney General, for the State.

HILL and Another v. CRUMP.

PRACTICE.—APPLICATION TO SET ASIDE JUDGMENT.—Three days after the rendition of a judgment against him, the defendant appeared and moved to set aside the default and judgment, and filed affidavits in support of his motion. The affidavits disclosed that he had employed counsel to defend for him, and had caused a subpoena to issue for his witnesses; that he had been prevented from attending court himself by the dangerous illness of his wife, and that his attorney, being Provost Marshal of the district, had been so engaged in enforcing the draft that he had been unable to attend the court, and had neglected to speak to any other attorney to represent him in the case. The affidavits also disclosed a meritorious defense to the action. The court overruled the motion to set aside the judgment.

Held, that the motion to set aside the judgment should have been granted.

Held, also, that as the plaintiff appeared by attorney, no notice of the application to set aside the judgment was necessary.

Held, also, that counter affidavits, controverting the truth of the facts stated in the affidavits upon which the application was based, could not be received.

Held, also, that while such applications are, under the statute, addressed to the discretion of the lower court, an appeal will lie from an abuse of that discretion, and the Supreme Court will, in such case, review the action of the lower court.

APPEAL from the Bartholomew Common Pleas.

RAY, J.—This was an action by *Crump* against the appellants, on a note and mortgage, which had been given by them to one *Matthews*, who assigned it to *Crump*.

On the 21st day of *March*, 1865, that being the second day of the term of the court, the appellants were defaulted, the cause was submitted to the court, and judgment was taken on the note and mortgage. On the 24th day of *March*, that being the fifth day of the term, the appellants filed affidavits, and submitted a motion to set aside the default and judgment, which was overruled. Exception was properly taken, and the affidavits were made part of the record by bill of exceptions.

The affidavit of appellant, *Jacob Hill*, stated that before the commencement of the term of court, he employed two

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attorneys of said court, partners in business, to defend the suit, and put them in possession of the facts constituting his defense, and gave them the names of his witnesses, and had them served with process; that owing to the dangerous illness of his wife, he was unable to attend the court until that day, and, for the same reason, was unable to remain in attendance during the remainder of the term, as the disease was feared to be of a fatal character. That *Matthews*, the assignor of the note in suit, sold and conveyed to the affiant the land described in the complaint and mortgage, for \$2000; that \$1800 of said sum was paid at the time of the sale; that said *Matthews* claimed to be the owner of eight acres of land adjoining the tract described in the mortgage, but, in truth, had no title to the same, but the title was in one *Lorenzo D. Conn*. That affiant objecting to said purchase, on account of said outstanding title, the said *Matthews* then and there agreed that if affiant would agree to pay him \$300, he would secure said *Conn's* title to said land to affiant, and said note for \$500 was given accordingly, with the mortgage, \$200 for the remainder of said sum of \$2000, and \$300 for said eight acres of land; that the right, title and possession of said eight acres of land still remained in said *Conn*. That on the day of the maturity of said note, the affiant tendered to the plaintiff the sum of \$212, principal and interest due upon the portion of the sum included in said note for which he had received a consideration.

The affidavit of one of the counsel employed for the defense disclosed these facts: The said attorney, at the time of his employment, was, and continued to be at the time of making the motion, Provost Marshal of the Third Congressional District; that the draft in said district was enforced by him on the 22d. of the month, and since the commencement of the term he had been too much engaged in preparing for and enforcing the draft to attend the court; that he forgot to speak to any attorney to watch said case for him. His partner had not been informed of

the employment, nor could he have attended the court, as he was engaged as one of the principal clerks in the provost marshal's office.

The application having been made to set aside the default at so early a day of the same term at which the default was taken, and showing clearly that the appellant was without fault, that the failure of his counsel to attend was, at most, excusable neglect on their part, and exhibiting, also, a meritorious defense, should have been granted on motion.

It is objected that no time was fixed within which *Matthews* was to procure the title to the eight acres. The conveyance must be made within a reasonable time, and more than a year had passed when the action was commenced.

The appellee insists that, as judgment had been rendered in the cause, he could only be brought into court by notice of the application to be made to set aside the default and judgment. The record shows both parties to the suit to have been present, appearing by counsel, at the time the motion was made, and, therefore, notice was not required.

It is also urged that the reasons why the court refused to set aside the judgment should be shown in the record. Where the bill of exceptions contains the affidavits upon which the motion is founded, we will consider ourselves as sufficiently advised of the reasons upon which the court based its action.

The judgment is reversed, at the costs of appellee, and the cause remanded, with directions that the default and judgment be set aside.

A petition for a rehearing having been filed, the following opinion, overruling the petition, was delivered by

RAY, J.—The appellee asks a rehearing in this case, on the ground, first, that the record does not purport to set forth all the evidence submitted to the court below upon the motion to set aside the default.

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The record shows that the motion was made upon the affidavits filed. In our opinion, it would not have been proper for the court to have received counter affidavits, denying the truth of the facts averred as constituting the defense. This would have been simply trying the merits of the action upon affidavits, and if the party had suffered default through his mistake, inadvertence, surprise, or excusable neglect, he was entitled, upon an affidavit showing facts constituting a meritorious defense, to have the truth of those facts passed upon by a jury. Nor can the truth of the facts stated as a cause for having the default set aside, be determined upon an issue raised by counter affidavits.

The second ground upon which the rehearing is asked is, that under the ninety-ninth section of the practice act, the application is addressed to the discretion of the court below, and the exercise of that discretion cannot be reviewed in this court. We have been cited to cases in the Court of Appeals of New York, where it has been held that such applications are addressed to the discretion of the judge before whom they are made, and that the exercise of that discretion will not be reviewed upon appeal. Such, however, has not been the rule in this State, but it has always been that the court must exercise a sound legal discretion, and that from an abuse of that discretion an appeal would lie to this court. It has been treated in the decisions in *New York*, to which we are referred, as a mere question of practice. The case under consideration, in our opinion, involves the substantial rights of the defendant. In the case of *Alvord et al. v. Gere*, 10 Ind. 385, which was an application in the court below to set aside a default, and permit the defendants to file answers, the action of the lower court in refusing such application was reviewed, and the cause was reversed for the error committed by the court in refusing to grant the application. In all cases presented here, upon appeal, where the proper exercise of the discretion of the court in ruling upon the

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application has been questioned, the point has been considered and decided in this court. We have done so in this case, and see no reason, upon the authorities cited, to reverse our action. If the statute submitted the application to the will of the judge before whom it was made, our ruling might be otherwise, but where the substantial rights of the party are involved, and the statute requires the judge to exercise his discretion, his action, with all presumptions in favor of such action, is still subject to review in this court.

The petition for a rehearing is overruled.

Stansifer and Winter, for appellants.

F. T. Hord, for appellee.

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REVERSING PREVIOUS RULINGS.—Great caution should be exercised by the Supreme Court in reversing former decisions, which have been received and acted upon as settling the law, and especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful.

SAME.—It is often better, in such cases, that what is settled should not be disturbed by judicial action, though it may be wrong.

FOREIGN INSURANCE COMPANIES.—Section 56 of an act entitled "an act for the incorporation of insurance companies, defining their powers and prescribing their duties," (1 G. & H. 398,) which purports to regulate the agencies of foreign insurance companies doing business in this state, is unconstitutional, because the subject of the section is not embraced in the title of the act, and is not matter properly connected with the subject expressed in the title.

APPEAL from the Marion Common Pleas.

FRAZER, J.—This was a prosecution for violating the fifty-sixth section of "an act for the incorporation of insurance companies, defining their powers and prescribing

24	295
129	295
24	295
135	27
24	295
143	502
24	295
4156	686
24	295
158	686
24	295
171	370

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their duties," as the same was amended by the act of 1855, 1 G. & H. 898, by doing business as agent of a foreign insurance company, without having complied with that act. It is contended that the provision of the act charged to have been violated is void, because it is not a subject expressed in the title of the act, nor a matter properly connected with the subject which is so expressed, as required by the 19th section of the 4th article of the Constitution of the State.

This very question was decided by this court against the validity of the enactment, more than five years ago, in *Igoe v. The State*, 14 Ind. 239. Three Legislatures have since held their sessions, and adjourned without, we believe, even attempting to enact the provisions thus held void, in a form which would be free from the constitutional objections then adjudged to exist. Our citizens, upon the faith of that decision, standing unquestioned so long, have unsuspectingly acted as agents for foreign insurance companies without complying with an act supposed, in good faith, to be void, and so pronounced by the solemn judgment of the court of last resort. All classes have, upon the like faith, purchased and paid for indemnity covering, in the aggregate, probably millions in value. We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this court, and received and acted upon as settling the law; and especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful. In such cases, it were often better that what is settled should not be disturbed by judicial action, though it be wrong. This principle has so often received the sanction of appellate courts, that it has become a maxim for their guidance, and it is especially important that it should not be forgotten here, where the judges hold for short terms, and where, unfortunately, the entire court may be changed at once. If it be also remembered that the validity of every contract of insurance, and every policy issued in this State, by foreign insurance companies, would be brought in question should

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we now overrule *Igoe v. The State*, it will seem quite unfortunate, at least, if we shall feel compelled to do so.

But we need not rest our judgment upon the considerations above alluded to. If the question were now here for the first time, we should be compelled to pronounce the enactment in question a plain violation of the provision of the State Constitution already referred to.

We have recently had occasion, in three cases, (*Reams v. The State*, 23 Ind. 111, *Robinson v. Skipworth*, 23 Ind 311, and *Hingle v. The State*, ante, p. 85,) to consider the scope and application of section 19, article 4, of the constitution. Thinking that the time had come when some rule ought to be declared which might be capable of somewhat general application in the interpretation of the clause in question, we took pains, in the two cases last mentioned, to declare what we deemed to be the mischiefs of our legislation which it was intended to prevent. One of them was stated to be the enactment of laws under false and delusive titles, whereby measures had procured the support of legislators, who were thus deceived as to the character of the laws; and another was deemed to be the conjunction, in one act, of two or more subjects having no legal connection, for the purpose of procuring the passage of laws which might not, alone, command legislative sanction, upon the strength of popular measures embraced in the same act. To prevent these tricks in legislation, the constitution absolutely, and in all cases, forbids the passage of any law, unless the subject of it be expressed in its title, and, in like manner, inhibits the embodying in the same act of two or more subjects, having no legal connection with each other. Whenever it is clear that this constitutional provision has been disregarded, or overlooked, we must not hesitate to pronounce the supremacy of the constitution, and, by consequence, the invalidity of the act, to the extent that it may be in conflict with the fundamental law.

The title of the act in question is not comprehensive enough to embrace the general subject of insurance. By

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the words, "an act for the incorporation of insurance companies, defining their powers and prescribing their duties," no one would understand that any insurance companies were referred to save those which might be organized under the act. The pronoun "their" is used instead of the name "insurance companies," for which it stands, and can embrace nothing more. The "insurance companies" referred to are clearly those which may be created under the act. Foreign insurance companies cannot, therefore, be meant, for they are organized under the laws of other states and other countries, and possess a legal existence, and their powers, without reference to our laws. It is, therefore, impossible to resist the conclusion that the section in question relates to a subject which is not expressed in the title of the act; and it remains only to inquire whether it has any proper connection with the subject which is so expressed. What is the connection? This question is not answered in the careful and able argument of the Attorney General. The making of regulations, upon compliance with which insurance companies existing elsewhere may do business here, would not be looked for in an act which purports, by its title, merely to provide for the incorporation of *Indiana* insurance companies, and to define their powers and prescribe their duties. It has no connection whatever with a subject thus limited. The proposition is so obvious as to forbid either argument or illustration. A conclusive reply to the suggestion that both belong to the general subject of insurance, is, as already stated, that the title to the act does not comprehend the general subject of insurance. The question before us is not whether the whole contents of the act *might* constitutionally have been enacted in this form, under a title sufficiently comprehensive.

It seems to us that the reasoning in *Robinson v. Skipworth*, and *Hingle v. The State*, is not only perfectly consistent with, but gives undoubted support to, the judgment of the court in *Igoe v. The State*; and that to

overrule that case, and affirm the one now in judgment, would be a practical nullification of a most wise and salutary constitutional provision.

As it seems to be conceded in the argument that if the section in the original act is void, the act amendatory of that section must also fall, a point decided in *Igoe v. The State*, there remains, it is apparent, no ground upon which the judgment below can stand.

The judgment is reversed, and the cause remanded, with directions to the court below to set aside all proceedings subsequent to the motion to quash the information, and to sustain that motion.

M. M. Ray, J. W. Gordon, A. G. Porter, B. Harrison, W. P. Fishback, T. A. Hendricks, S. E. Perkins, O. B. Hord and E. W. Kimball, for appellant.

D. E. Williamson, Attorney General for the State.

HUNTER and Others v. BALES.

PRACTICE.—Where in a suit there are two conflicting theories, and there was evidence on the trial tending to support each, the Supreme Court will, on appeal, adopt the theory which will sustain the finding of the court below.

CONTRACT FOR SALE OF REAL ESTATE.—SPECIFIC PERFORMANCE.—A, by his agent, engaged by an oral contract to sell a tract of land to B. A afterward, in person, orally engaged to sell the same tract to C. Subsequently, A made a title bond to B for the land, but before having executed a deed, conveyed the land by deed to C, who had full knowledge of the outstanding title bond.

Held, that as between B and C, B had the prior equity, and could enforce a specific performance.

SAME.—In equity, a contract for the sale of land is not merely executory, but the vendee becomes the owner, and the vendor is seized in trust for him, and has a mere lien for the purchase money. But the contract must be such an one as would support a decree for specific performance.

EQUITY.—Nothing undone will be looked upon in equity as done, but what ought to be done, nor except in favor of those who have a right to pray that it shall be done.

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SPECIFIC PERFORMANCE.—TENDER.—In a suit for specific performance, where money is due from the plaintiff, it is sufficient for him to offer by his complaint to bring it into court, whenever the same shall be liquidated, and he has a decree for performance.

SAME.—INTEREST AFTER TENDER.—After the obligee in a title bond tenders the purchase money and all interest accrued, and demands a conveyance, he is not chargeable with interest, unless he has used the money, and it is incumbent on the vendor to prove such use.

APPEAL from the *Hancock* Circuit Court.

GREGORY, J.—*Bales*, as assignee of one *Thompson*, prosecutes the case in judgment against *Matthew R. Hunter*, *Moses Hunter*, and one *Moore*, for the specific performance of a contract for the sale of real estate. Trial by the court; finding for the plaintiff; motion for a new trial overruled, and decree for specific performance. The defendants appeal to this court. There are two conflicting theories in this case, and there was evidence on the trial in support of each. In such case, it is the duty of the appellate court to adopt that theory which will sustain the finding below. That court saw the witnesses, heard them testify, observed their conduct, and had a better opportunity of forming a just conclusion on the weight of the evidence than we can have from the reading of the transcript of the record. Whatever we may think of the testimony, under the rule on the subject, the court below had a right to find that *Moore* resided in *Ohio*; that in 1856, he was the owner of the land; that in the spring of that year, *Thompson*, who resided in *Indiana*, visited the former with a view of purchasing it; that *Moore* declined selling, but promised that he would be out to *Indiana* in the fall, and that if he concluded to sell, he would give *Thompson* the refusal; that *Moore* did come to *Indiana* that fall, and appointed one *Phippens* his agent to sell the land; that *Moore* and *Thompson* met; that the latter proposed to purchase the land, but the former said he was going to *Iowa*, and had not time to attend to the matter, and referred him to his agent, who he said was authorized to sell to him, and that after informing him

of the terms, they parted; that *Thompson* went to the agent, and made a verbal agreement to purchase the land, which was to be reduced to writing the next day, but on *Thompson's* offering to comply, the agent declined to execute the writings, and said that *Moore* might sell his own land; that on the 1st of *December* of that year, *Moore* made a verbal agreement to sell the land to *Matthew R. Hunter*, provided the agent had not sold it, by which agreement *Hunter* was to pay a part of the purchase money on *Moore's* return from *Iowa*, and give his note for the residue, payable in one year, upon which *Moore* was to execute a deed. On the 6th of *December*, 1856, *Moore* executed the title bond now in suit to *Thompson*. The latter told the former, at the time, that he had purchased the land of the agent so far as words could do it. On the 12th of that month, *Moore* deeded the land to *Matthew R. Hunter*, with a full knowledge in the latter of the prior written agreement to *Thompson*. *Thompson* tendered the purchase money of the land, when due, to *Hunter*, the last payment in *December*, 1857, and demanded a deed, which was refused. *Matthew R. Hunter*, in *February*, 1858, conveyed the land, together with another eighty acre tract, to *Moses Hunter*, for \$1600, only \$150 of which has been paid.

It is urged that *Thompson* did not make a verbal contract with the agent; that it was only a negotiation; that the agreement was to be reduced to writing, and until that was done, the bargain was not consummated. It is just as true of the verbal understanding between *Hunter* and *Moore*, for that was to be reduced to writing by the execution of the deed, and the giving of the note for the deferred payment.

We think that the court below, in finding that *Thompson* had the prior equity, did not commit an error of which the appellants have a right to complain.

There is a question much discussed by counsel, which, we think, is not necessary to the decision of the case; but,

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under one theory of it, that question is one of importance, and we are not inclined to pass it over in silence.

It is contended that a parol contract for the sale of land, or for a lease for a longer term than three years, is not void, but valid for many purposes, and a conveyance in compliance with such a contract will relate back to its date, and overreach an intermediate valid sale; that a vendor may, by pleading the statute of frauds, avoid a parol contract for the sale of land, or he may waive it and consummate his contract, and cannot be deprived of his right to do so by a stranger. The cases of *Gudgell v. Dwall*, 4 J. J. Marsh. 290, *Clary's Heirs v. Marshall's Heirs*, 5 B. Monroe 266, *Lucas v. Mitchell*, 8 A. K. Marsh. 244, *Minns v. Morse*, 15 Ohio 568, and *Dawson v. Ellis*, 1 Jacob & Walker's Ch. Rep. 508, are cited in support of this proposition.

But we think the true rule is, that the vendor makes his election to treat the prior verbal contract as void, whenever he makes a valid agreement of sale in the face of it, and that the intermediate purchaser, in such a case, is shielded by the statute, as well as the vendor. In equity, a contract for the sale of land is not merely executory, but the vendee becomes the owner, and the vendor is seized in trust for him, and has a mere lien on the land for the purchase money, upon the maxim that "equity looks upon that as done which is agreed to be done." The contract, however, which in equity will make him the owner, must be a valid contract; must be such that he has a right to pray a specific performance of it. Equity looks upon that as done which is thus agreed to be done, and it relates back to the contract. But nothing is looked upon in equity as done, but what ought to be done; not what might have been done. Nor will equity consider a thing as done except in favor of those who have a right to pray that it may be done. 2 Story's Eq. Jur., § 792, and authorities there cited.

It is proper to remark that the case of *Dawson v. Ellis*,

supra, and the case of *Crabb v. Bull*, 2 Caines' Cas. 801, cited by *Broune* in his work on the Statute of Frauds, do not sustain the proposition contended for. And we think that the *Kentucky* cases are founded on a false premise, viz: the moral obligation resting on the vendor to fulfill his verbal agreement. The law secures to the vendor the right to elect to treat such an agreement as void. There is no moral turpitude involved in the act; and once having made that election, by a valid sale in contravention of the verbal agreement, we think he cannot defeat the rights of the intermediate purchaser by a conveyance, unless on the full payment of the purchase money, without notice of the valid agreement.

The appellants contend that the purchase money tendered ought to have been *brought into court*. This is not necessary. In *Irvin v. Gregory*, 13 Gray 215, in delivering the opinion of the court, SHAW, C. J., says: "The vendee does not make a strict unconditional tender, but only an offer upon receiving the conveyance, without which he is not obliged to pay. When money is brought into court, with a plea of tender, it is an admission of the party bringing it that the adverse party is entitled to it, and may take it out when he pleases. But in a suit for specific performance, it is sufficient for the plaintiff to offer by his bill to bring in his money, whenever the same is liquidated, and he has a decree for performance."

According to the English practice, the purchase money is never paid into court, except upon the order of the court. Dart. on Vendors 516; Fry on Spec. Per. 490. Purchase money paid into court is the property of the vendors.

The tender was made to *Matthew R. Hunter*, when the purchase money became due, and before he conveyed to *Moses Hunter*.

The defendants insist that the court should have allowed interest from the time the purchase money was tendered. *Thompson* tendered the interest due when the tender was

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made, and that in all the interest the defendants were entitled to. This question was directly before the court in 5 Ala. R. 761, in which the court held that the defendant was not entitled to interest. "The presumption," says the court, "is that the money is unproductive in the vendee's hands, and he is not chargeable with interest, unless he used it, *which use it devolves on the vendor to prove.*" No tender is necessary where the vendor denies the contract. 6 Wis. 127.

When payment is to be made upon a conveyance being made, no interest is allowed until a deed is tendered. So though the purchaser took possession, if the land is vacant and unproductive. *Stevenson v. Maxwell*, 2 Sandf. Ch. 273. So when the vendee tenders the purchase money, and the vendor refuses it. *January et al. v. Martin*, 1 Bibb. 586. So whenever the vendor is the cause of the contract not being executed.

The judgment of the court below is affirmed, with costs.
N. B. Taylor and *D. Moss*, for appellants.
S. Major, for appellee.

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PRACTICE.—Where the trial below is by the court, the same presumption will be indulged in favor of the finding, on appeal, as if the trial had been by a jury.

REPLEVIN.—A general finding for the plaintiff, in an action of replevin, involves a finding that the plaintiff is the owner of the property, where such ownership is alleged in the complaint.

APPEAL from the *Wabash* Circuit Court.

GREGORY, J.—*Teague* sued *Rowan*, in replevin, for the canal boat *J. M. Bratton*, her furniture and apparel, and three horses. Trial by the court; finding for the plaintiff, and that he is entitled to the possession of the property in controversy, and was at the commencement of the suit,

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that the defendant unlawfully took and detained the same, as alleged, and that the plaintiff is entitled to \$100 damages for the taking and detention of the same. The court also found the value of the property. The complaint does not charge an unlawful taking, but an unlawful detention. There is a conflict in the testimony, and it is urged, as the trial was by the court, and not by a jury, that it is the duty of this court to weigh the evidence; but this is not the law. The court sat as a jury, saw the witnesses, and could better judge of their credibility than we can, and the same rule applies.

We have looked through the testimony, and think the finding is sustained thereby. The evidence tends to show that *Teague* was the owner of the property in controversy; that it was attached at *Toledo, Ohio*, for debts; that by an arrangement between *Teague* and *Rowan*, the former furnished \$100, and the latter bid in the property at the judicial sale, under the stipulation that *Teague* should have the possession thereof, and repay *Rowan* in freighting lumber to the amount advanced by him, over and above the \$100, to purchase the property. *Teague* offered to perform his agreement, but *Rowan* refused, and took forcible possession of the property. It is urged that the judgment does not follow the finding, in this, that the finding is only that the plaintiff is entitled to the possession of the property, when the judgment is that the plaintiff is the owner thereof. We think that the general finding for the plaintiff embraces the allegation of ownership in the property.

It is claimed that the court below erred in assessing damages for the *taking and detention*, when the complaint is only for the unlawful detention. We have looked through the evidence on the question of damages, and think that substantial justice was done. 2 G. & H., § 580, p. 278.

The judgment is affirmed, with costs.

D. D. Pratt and *D. P. Baldwin*, for appellant.

J. U. Pettit and *T. T. Weir*, for appellee.

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163	236

24	306
171	14

WILSON and Others v. WHITSELL and Others.

HIGHWAYS.—It is not necessary, under our statute, that the persons remonstrating against the location, vacation, or change of a highway, should reside immediately on the line of the highway to be located, vacated, or changed, but it is enough if they reside in the vicinity, or within such reasonable distance thereof that they would be affected thereby, in their convenience of travel, or otherwise.

SAME—PRACTICE.—Where a remonstrance against the location, change, or vacation of a highway, has been received and acted upon by the board of commissioners, without objection, it is too late, after the case has been taken by appeal to the Circuit Court, to object that the remonstrants were not persons residing along the proposed highway.

SAME.—The viewers appointed to review a proposed change in a highway, against which a remonstrance had been filed, reported in favor of the proposed change, provided the petitioners would, at their own cost, put the new route in as good condition as the old, otherwise against the change. The board of commissioners thereupon ordered that when the condition mentioned in the report of the viewers should be complied with, the new route would be established as a public highway. At a subsequent session of the board, one of the original petitioners filed his petition, alleging that the condition had been complied with, and asking that the new route be accepted and established, and, thereupon, the board ordered that the new route be established and kept in repair as a public highway. Within thirty days after this last order, the remonstrants appealed to the Circuit Court.

Held, that the appeal was taken in time.

Held, also, that the viewers had no authority to make their report in favor of the utility of the road dependent upon the opening of the road by the petitioners.

APPEAL from the *Howard* Circuit Court.

ELLIOTT, C. J.—The appellants filed a petition before the Board of County Commissioners of *Tipton* county, at the *December* term, 1860, praying that the road leading from *Tipton* to *Windfall*, in *Tipton* county, and thence to *Jerome*, in *Howard* county, be so changed as to run as follows: "Beginning at the point where said road crosses the *Peru & Indianapolis Railroad*, thence in an easterly direction, parallel with the southern boundary of the Indian reserve, to land owned by *Evans & Bro.*, thence north along the line dividing the lands of *Evans & Bro.*

and *Joseph W. Wilson*, to said *Tipton*, *Windfall* and *Jerome road*." Viewers were duly appointed to examine the proposed change, and, at the *March* term, 1861, reported to the board that they had viewed the proposed change, and that it was of public utility, and recommended that it be made. *Whitsel* and fifty-nine others, "citizens of *Cicero* township, in said county," thereupon filed their written remonstrance, protesting against the proposed change, as not being of public utility. Upon the filing of the remonstrance, the commissioners, under the provisions of the statute, appointed three other persons as viewers, to review and report upon the public utility of the proposed change.

At the *June* term, 1861, the last named viewers reported that they had carefully reviewed the proposed change in said highway, and believed the same to be of public utility, and recommend that the same be located and established as described in the petition and notice to viewers, "provided the petitioners shall first open and put said new road in as good condition as the old one, at their own expense. But on failure of the petitioners to comply with the above condition, then we report against said change."

The commissioners thereupon entered the following order in reference to said report, viz: "Said report being publicly read, and no person objecting thereto, it is, therefore, ordered, that said report be recorded, and that the road be declared a public highway, to the width of forty feet, upon the conditions named in said report, and upon no other, to-wit: that the said petitioners open and put said road in as good repair, as to clearing, bridging, grading and ditching, as the old road; at which time, and not before, the said new route will be established and located as a public highway, and thereafter kept in repair according to law."

At the *September* term, 1863, of the board of commissioners, *Joseph W. Wilson*, one of the original petitioners, filed a petition stating that the new road was fully completed, according to the conditions in the previous

Wilson and Others v. Whitsel and Others.

order of the board, and praying that it be received, and for an order vacating so much of the old road as was changed by said order. Whereupon, as we are informed by the record, "the *board* proceeded to said road, and made a personal inspection thereof, and, after a careful examination of the same, agreed to receive it in compliance with said condition," and then and there declared the same to be a public highway, "whenever it shall be opened the width required; and the said road is hereby ordered to be kept in repair as such, from henceforward, and that the old road, between the commencement and termination of the change, be vacated."

The remonstrants then moved the board to set aside the original petition, the report of the viewers, and the order of the board establishing the change, and vacating that part of the old road; but the motion was overruled, and they thereupon appealed to the *Tipton* Circuit Court. The cause was afterward moved, by change of venue, to the *Howard* Circuit Court.

In the Circuit Court, the appellants moved to strike out the remonstrance, for the reason "that none of the persons signing the same resided along the proposed change, or the highway to be vacated." The motion was supported by affidavit, but the court overruled it. They then moved the court to dismiss the appeal, on the ground that it was not taken within thirty days next after the determination of said board, locating and establishing the proposed change, but the court overruled the motion. The cause was tried by a jury, who returned a verdict that the proposed change was not of public utility. Motion for a new trial overruled, and judgment against appellants for costs.

The errors assigned are: 1. The court erred in overruling the appellant's motion to strike out the original remonstrance. 2. The court erred in overruling the appellant's motion to dismiss the appeal. 3. The verdict of the jury is contrary to law, as it is not upon the issue in the cause.

We will examine them in the order in which they are presented.

The first question is, did the court err in refusing to strike out the original remonstrance, on the alleged ground that none of the persons signing it "resided along the proposed change, or the highway to be vacated?" The statute under which the remonstrance was filed provides that "if any one or more freeholders, residing in such county, along such proposed highway, vacation or change, shall object to the same, at any time before final action thereon, as not being of public utility, other viewers may be appointed," &c. The remonstrance describes the persons signing it, as "citizens of *Cicero* township, in said county." This description does not conform to the language of the statute, and yet they may be freeholders, and some one or more of them reside along the proposed change or vacation, within the proper meaning of the statute, which we do not construe to mean that, to enable a freeholder to object, he must reside immediately on the line of the proposed change, or road to be vacated, but in its vicinity, or within such reasonable distance thereof that he may be affected by the change or vacation in his convenience of travel, or otherwise.

But the motion was properly overruled, for the reason that the objection, if otherwise properly made, came too late. No objection was interposed at the time the remonstrance was filed, either by the appellants or the board of commissioners. The latter recognized their right to object to the proposed change, and, upon the filing of the remonstrance, appointed viewers to review it; upon their report, and the subsequent proceedings of the board thereon, the final order was made establishing the change, and it was too late to deny their right to make the objection, on appeal, in the Circuit Court. See *Little v. Thompson et al.*, *ante*, p. 146.

But it is urged that the court erred in overruling the appellant's motion to dismiss the appeal. We think other-

wise. It is admitted that the appeal was taken in less than thirty days after the order of the board, at the *September* term, 1863, establishing the change, declaring it a public highway, and vacating that part of the old road. But the appellants insist that the report of the reviewers, and the order of the board, at the *June* term, 1861, established the proposed change, and was final. In this, we think, they are in error. That report, and the order of the board upon it, we apprehend, are without precedent, and certainly without authority; but it was not final, nor does it purport to be so. It was the duty of the viewers to determine and report whether the proposed change was, or was not, of public utility. They do neither, but make a conditional report, that if the petitioners will open the new road, then they say the change is of public utility, but if they refuse to do so, then their report is that it is not of public utility. They were not authorized to annex such a condition, and the petitioners were clearly not bound to comply with it, and unless they did comply, the report stood against the public utility of the change. The change was not, therefore, authorized or established at that time. Nor, as we have already said, does the order of the board, made at that term, purport to establish the change. The language is, that when the new route is opened, and made as good as the old one, "the said new route *will be* established and located as a public highway." It is also evident that it was so understood, both by the appellants and the commissioners, and hence the petition, at the *September* term, 1863, to have the new road received and established, and the old one vacated, and the order of the board, after a careful personal inspection, in conformity with the petition.

The only remaining error assigned is, that the verdict of the jury is not upon the issue in the cause.

The only issue in the cause was made by the remonstrance, denying that the proposed change was of public utility.

Thom and Another v. Wilson's Executor. Rutherford v. Moore.

That was the issue properly submitted to, and passed upon by, the jury. There is nothing in the objection.

The judgment is affirmed, with costs.

D. Moss and Lindsay & Lewis, for appellants.

J. Green, for appellees.

THOM and Another v. WILSON'S Executor.

APPEAL from the *Jefferson* Common Pleas.

FRAZER, J.—There is a motion here like that in *Thom et al. v. Wilson's Executor*, *post.* p. 828, to strike a bill of exceptions from the record of the court below. We have no jurisdiction to grant such a motion, or to act upon the question presented by the motion. The motion is, therefore, overruled.

A reversal of this case is sought upon the ground that the evidence does not support the finding of the court below. We have looked into the evidence, and are of the opinion that the finding could not have been otherwise.

The judgment is affirmed, with 5 per cent. damages, and costs.

J. E. McDonald and *A. L. Roache*, for appellants.

C. E. McDonald, for appellee.

RUTHERFORD v. MOORE.

APPEAL from the *Union* Common Pleas.

GREGORY, J.—*Moore* sued *William Maynes* and the appellant on three several bonds, executed by *Maynes* as principal, and *Rutherford* as surety. The first was an

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injunction bond; the second an appeal bond, in an appeal to this court from an order of the *Union* Circuit Court, dissolving the injunction; the other was a bond given by the defendants, in the court below, on a writ of error from the Supreme Court of the *United States* to this court, in the same case.

The first error complained of is a misjoinder of causes of action. There is nothing in this, but if there was a misjoinder, that could not be assigned for error in this court. 2 G. & H., § 52, p. 81.

The next error complained of is that the damages assessed by the court below are excessive. The injunction restrained *Moore* from having a writ of possession executed, issued by the Auditor of State, in his favor, against *Maynes*, for lands sold at a sinking fund sale. The appellee had a right to recover for the use and occupation of the land for the time he was kept out of the possession thereof by the wrongful proceedings of *Maynes*.

The last error assigned is that the judgment is against the appellant, when it ought to have been against *Maynes* and *Rutherford*. For this error the judgment must be reversed. The bonds were the joint obligations of *Maynes* and *Rutherford*, and were so treated by the appellee in bringing suit thereon. The defendants below both appeared and plead to the action, the finding of the court was for the plaintiff, and judgment should have followed against both defendants.

The judgment is reversed, with costs, and the cause remanded to said court, with instructions to render judgment, on the finding, against both defendants.

J. S. Reid and *J. M. Gardner*, for appellants.

Kessler v. The State, on the relation of Wilson.

KESSLER v. THE STATE, on the relation of WILSON.

RECORD OF MORTGAGES.—ENTRY BOOK.—Where a mortgage is left for record with the recorder, and is entered by him in the entry book, as required by the statute, it must be deemed to be recorded from the date of its reception, as noted on the entry book, and no injury can result to any one from a failure of the recorder actually to record the instrument.

APPEAL from the *Tipton* Circuit Court.

ABSTRACT.

The State, on the relation of *Wilson*, filed her complaint, averring that appellants, and one *John S. Kessler*, now deceased, on the 20th day of *November*, 1859, jointly and severally bound themselves to the State of *Indiana*, in the sum of \$2000, conditioned to the effect that said *Kessler*, who before that time had been elected recorder of said *Tipton* county, should well and faithfully discharge the duties of said office during the term for which he was elected, a copy of which official bond is filed with the complaint; that said *Kessler* committed a breach of said bond in this, that on the 7th day of *August*, 1862, one *William Barr* executed and delivered to the relator a mortgage on a steam engine and boiler, a shingle machine, and all the tools and fixtures to the same belonging, to secure the payment of a note executed by said *Barr* to the relator, for \$128 40, which note and instrument purporting to be a mortgage, are filed with the complaint. The complaint then further avers the note to be wholly unpaid, and that immediately on the execution of the mortgage, the relator left it with said recorder for record, paying the recorder his fee therefor; that said recorder failed to record the same, and that, thereafter, said *Barr* sold said mortgaged property to an innocent purchaser, before the maturity of said note, and before the time had arrived when, according to the terms of the mortgage, the relator was entitled to the possession of the

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property, and that *Barr* immediately afterward left the state, wholly insolvent, and that the mortgaged property was amply sufficient to have secured the payment of the note; that by said *Kessler's* failure to record the mortgage, the relator wholly lost said debt, whereby appellants became liable to pay.

Appellants filed their demurrer to the complaint, assigning for cause that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court. The appellants then filed their answer in denial.

The cause was submitted to the court for trial. The relator introduced in evidence the official bond of said *Kessler*, executed by him with appellants, his sureties, and proved that, on the 7th day of *August*, 1862, said *Barr* delivered to relator an instrument purporting to be a mortgage on one steam engine and boiler, one shingle machine, and all the tools and fixtures to the same belonging, which instrument was then introduced in evidence by the relator, and that said instrument was given to secure the payment of the note introduced by the relator in evidence. This further evidence is then given by the parties: that, afterward, *Barr* sold the mortgaged property to an innocent purchaser, before the note matured, and before the arrival of the time when the relator was entitled to the possession of said property, and that *Barr* immediately thereafter left the state, wholly insolvent, and that the mortgaged property was amply sufficient to have paid the note; that the mortgage was left at the said recorder's office in *Tipton* county, on the day it was acknowledged, the fee for recording the same paid, the time of receiving it indorsed by the recorder, and the fact of so receiving the instrument, purporting to be a mortgage, entered on the "entry book," kept by the recorder, and that the said instrument, in fact, never was recorded, nor subscribed by the mortgagor.

The court thereupon found for the appellee, and assessed

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her damages at \$136 50, for the use of the relator. Thereupon the appellants moved the court for a new trial, but the motion was overruled, and judgment rendered for appellee for \$136 50.

RAY, J.—Our statute provides, (1 G. & H., § 29, p. 265,) that “every recorder of deeds shall keep a book, each page of which shall be divided into five columns, headed as follows, to-wit: date of reception; names of grantors; names of grantees; description of lands; volume and page where recorded. And the recorder shall enter in said book, all deeds and *other instruments* left with him to be recorded; noting in the first column the day and hour of receiving such instrument, and the other particulars in the appropriate columns; and every such deed or instrument shall be deemed as recorded at the time so noted.”

The evidence shows that the recorder had so noted the mortgage upon his entry book, as required by the law, and it must, therefore, “be deemed as recorded,” and no injury could have resulted to the relator by reason of any failure actually to record the mortgage. An examination of the entry book, which is as much a record required by the statute to be kept as any other book of record in that office, would have disclosed all the material facts, and given actual notice of the contents of the mortgage. The provision of the statute we have quoted renders it unnecessary that we should pass upon any of the points presented by the appellant’s brief.

The judgment is reversed, and a new trial ordered. Costs against appellee.

N. R. Lindsay and J. A. Lewis, for appellant.

D. Moss, for appellee.

Smith v. Fitzgerald.

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SMITH v. FITZGERALD.

NUISANCE.—The statute provides for an action in favor of any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, and, where a proper case is made, the nuisance may be enjoined or abated, and damages recovered.

INJUNCTIONS.—Restraining orders and injunctions may be granted, under our statute, whenever it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great injury to the plaintiff.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—*Fitzgerald* filed his complaint in the *Marion* Circuit Court against *Smith*, complaining of a nuisance alleged to be maintained by the defendant. The nuisance is described as disagreeable odors along south *Delaware* street, in the city of *Indianapolis*, caused by a flow of impure water from the brewery of the defendant, situated on *Wyoming* street, in the same city. The plaintiff alleges that he has a residence on south *Delaware* street; that this impure water flows in front of his residence, and impairs the enjoyment of his property; that on one occasion, the defendant was prosecuted, criminally, before the mayor of the city for the same nuisance, that he pleaded guilty, and was fined one dollar; that at the request of the plaintiff, he had promised to discontinue the nuisance.

The plaintiff below moved for an injunction, and the court, upon the hearing, granted it. *Smith* appealed.

The order of injunction is as follows: "It is, therefore, ordered that the defendant, and all persons claiming under him, and acting by his authority, be and they are hereby restrained and forbidden from casting, pouring or flowing into the gutters, or other parts of *Wyoming* street named in the complaint herein, the rinsings or other cleansings of vessels which have contained beer, or any of the

substances from which beer has been made, or to flow or cause to run therein any of the washings of the floors of his said brewery. This order to be in force until the second day of the next term of the *Marion* Circuit Court, or until further order be taken in the premises."

This does not restrain the appellant from flowing the pure water used in his brewery, nor in any wise interfere in the proper pursuit of his business, but only restrains him from the abuses complained of.

The statute defines a nuisance to be "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property." 2 G. & H., § 628, p. 288. We have carefully looked through the affidavits, and think that the case is fully made out, under the allegations in the complaint, and the requirements of the law.

It is claimed that the appellee does not make a case for relief, in view of the rule in equity, that a court of chancery will not interfere to prevent or remove a private nuisance, unless it has been erected to the annoyance of the right of another, long previously enjoyed; that it must be a case of strong and imperious necessity, or the right previously established at law, before the party is entitled to an injunction.

The statute provides, in cases like the one in judgment, for an action in favor of any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and, when a proper case is made, the nuisance may be enjoined or abated, and damages recovered. 2 G. & H., §§ 629, 630, p. 289.

The statute provides that restraining orders and injunctions may be granted, where it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or

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continuance of which, during the litigation, would produce great injury to the plaintiff. 2 G. & H., § 137, p. 132.

We think that the appellee has made a case within this statutory rule. The injunction does not deprive the appellant of the proper use of his brewery, nor interfere with his business, and is, therefore, not within the rule in equity cited above.

The order of the court below is affirmed, with costs, and the cause remanded to said court for further proceedings.

L. Barbour, J. D. Howland and J. T. Jackson, for appellant.

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132 271

RAYMOND and Another v. PRITCHARD.

HUSBAND AND WIFE.—TITLE BOND.—A sold certain real estate to B for \$800, the price to be paid in labor. At the request of B, A executed to the wife of B a title bond, conditioned for the conveyance of the property to her, on payment of the price. Suit by the wife for a specific performance, alleging that about \$250 of the purchase money had been paid by the labor of the husband, and offering to pay the residue in money, when the amount should be ascertained.

Held, that a husband may give real estate to his wife, whether his title be an absolute fee, or merely a right in equity, and the equitable estate of B having, in this case, passed by an executed gift to the wife, she was entitled to enforce a specific performance of the bond.

Held, also, that after having made and executed the gift, it was not in the power of the husband to revoke it.

Held, also, that the consideration of a contract need not have moved from the party in whose favor it was made, and who seeks to enforce it.

PLEADING.—An answer alleging generally that some other person than the plaintiff is the real party in interest, without stating the facts which support that conclusion, is bad.

APPEAL from the Wayne Circuit Court.

FRAZER, J.—*Elizabeth Pritchard*, the appellee, brought suit against *Raymond* and her own husband, alleging in her complaint that her husband refused to join with her

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as plaintiff. It appeared further by the complaint, that in 1863, *Raymond* had executed and delivered to her a title bond for a lot in *Cambridge City*. It was recited in the condition of the bond that *Raymond* had sold to the husband, *Isaac Pritchard*, lot 21, east of the river, for \$300, which sum *Isaac* was to pay in work, according to an agreement between him and the obligor; that *Isaac* desired the lot to be conveyed to his wife, *Elizabeth*, wherefore, upon payment of the \$300, the obligor bound himself to make to *Elizabeth* a good title to the lot. It was alleged in the complaint that the agreement between the defendants was for carpenter work; that it was in their possession, and its terms were unknown to the plaintiff; that the husband, *Isaac*, had paid upon the lot about \$250, and that the plaintiff was willing to pay the balance, in cash, whenever she could ascertain it; that both defendants declined to inform her of the amount, and that *Raymond* will not demand work to be done upon the contract.

The plaintiff prayed that the amount of the unpaid purchase money be ascertained, and that she be permitted to pay it into court, and that *Raymond* be compelled to convey the lot to her.

The first question presented here arises upon the overruling of separate demurrers by the defendants to the complaint, for the want of sufficient facts.

We suppose it will hardly be doubted that a husband may give real estate to his wife. This may be done, whether his title be an absolute fee, or merely a right in equity. If the facts recited in the condition of *Raymond's* bond be true, such a gift was, in this case, executed by the husband to the wife. Nothing remained to be done by the husband to vest in the wife whatever interest he had in the lot, by virtue of his contract of purchase with *Raymond*. *Raymond's* obligation to convey was transferred to the wife, and the instrument sued upon thereupon given by *Raymond* directly to the wife. We know of no reason, sufficient in law or equity, why

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he should not be compelled to perform it. He has received a large part of the price, and he is now under no obligation to convey to the husband. Does equity say that he may keep the lot and the \$250 also? The gift from the husband to the wife being executed, and the consideration for *Raymond's* contract being a valuable one, the authorities cited by the appellant, to the effect that an executory contract which is voluntary, or founded on the consideration of blood or marriage only, will not be enforced in equity, do not seem to us to be applicable to the question in hand. It is not sought to compel the husband to pay the unpaid purchase money. We think that the objection made to the complaint is not well taken. What has been said is applicable to several other rulings of the court below, and renders it unnecessary to extend this opinion by making a particular reference to them.

After having made and executed the gift, as we have seen, it was not in the power of the husband afterward to revoke it. The third paragraph of the answer, alleging such revocation, was therefore bad, and a demurrer was properly sustained to it.

It is well settled that the consideration for a contract need not have moved from the party to whom the contract is made, and who seeks to enforce it, and, therefore, demurrers were properly sustained to the second and fifth paragraphs of the answer, each of which alleged that no consideration was paid by the plaintiff for the lot.

The fourth paragraph of the answer averred "that the defendant *Isaac Pritchard* is the real party in interest, and not said plaintiff." To this a demurrer was sustained, and that ruling is assigned for error. This question has been decided against the sufficiency of the answer. It should have alleged facts which would show, as a matter of law, that *Isaac Pritchard* was the party who, alone, should have brought the suit. *Garrison v. Clark*, 11 Ind. 369; *Swift v. Ellsworth*, 10 Ind. 205; *Lamson v. Falls*, 6 *id.* 309.

The appellants urge that the finding of the court was

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not sufficient to justify the judgment; but no such question was made below, and it is too late to present it for the first time in this court.

The judgment is affirmed, with costs.

J. B. Julian, G. A. Johnson and L. Develin, for appellants.

N. S. Ballenger and N. H. Johnson, for appellee.

DONOVAN v. THE TOWN OF HUNTINGTON.

SUPREME COURT.—JURISDICTION.—In a prosecution instituted before the mayor of a town, for a violation of a town ordinance, a fine of \$5 was assessed against the defendant, and on appeal to the Circuit Court a like fine was again assessed.

Held, that an appeal will not lie to the Supreme Court, the amount in controversy being less than \$10.

APPEAL from the *Huntington* Circuit Court.

GREGORY, J.—A complaint was filed before the mayor of the town of *Huntington*, against the appellant, for a violation of an ordinance of the common council, in relation to opening and closing turn-bridges within the limits of the town.

The mayor assessed a fine of \$5, and rendered judgment therefor, together with costs, from which the defendant appealed to the Circuit Court. The case was submitted to the court on an agreed statement of facts, upon which the court below found the defendant guilty, and assessed a like fine. Motion for a new trial overruled. A bill of exceptions, containing the evidence, is in the record. There are no briefs on either side. There is a petition for rehearing, in which it is suggested that the question is one of public interest, but we are in the dark as to what that question is. We think that the common council had the power to pass the ordinance in question as a police regulation, and that the same would apply to all turn-

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bridges in the town limits, whether the same were built by proper authority or not. If the bridge was erected without authority from those having control of the canal, it is for them to take steps to have it removed; their silent acquiescence would amount to a license. The penalty provided in the ordinance is any sum not less than \$5, nor more than \$50. We have considered a question of jurisdiction in this court. The statute provides that, "Appeals may be taken from the Courts of Common Pleas and the Circuit Courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed ten dollars." 2 G. & H., § 550, p. 269.

The case of *Bogart v. The City of New Albany*, 1 Ind. 88, was a proceeding to recover a penalty annexed to a breach of the by-laws of the city. The amount claimed was more than \$20, but the amount recovered in the inferior court was ten dollars. Under the statute then in force, which provides that, "No appeal or writ of error shall be allowed in respect to judgments rendered by any inferior court, in suits which originated before justices of the peace, when the amount in controversy, exclusive of interest and costs, is under the sum of \$20," (R. S. 1843, § 9, p. 628,) it was held that the amount in controversy in this court was under \$20, and, therefore, there was no jurisdiction. This is in point in the case in judgment. We hold that we have no jurisdiction, and any thing else said in this opinion is *obiter*.

The appeal is dismissed, for the want of jurisdiction.

E. Haymond and *J. Brackenridge*, for appellant.

J. R. Coffroth, for appellee.

 Thom and Another v. Wilson's Executor.

THOM and Another v. WILSON'S Executor.

PRACTICE.—An application for the correction of a record must be made to the court in which the proceedings were had. If an imperfect or incorrect transcript has been sent up to the Supreme Court, a writ of *certiorari* will be awarded, upon proper application; but the appellate court must act upon what has been done, and appears of record, below, and cannot undertake to correct the record of the lower court.

EVIDENCE.—**RECORD.**—A properly certified copy of an affidavit which had been filed in the Supreme Court, as the basis of a motion to reinstate a case which had been dismissed, was given in evidence against the party who had made it, in an action in the lower court.

Held, that as the affidavit was not connected with the case on trial by other evidence, it was irrelevant, and as it could properly have had no influence in the case, it will be presumed that it had, in fact, none.

Held, also, that as it did not appear that any motion was made upon the affidavit to reinstate the case, and as the case dismissed was no longer *in fieri*, the affidavit was not the fragment of a record, but an isolated paper.

WITNESS.—**EXECUTOR.**—In a suit against an executor, upon a contract made with the testator, where the judgment, if the plaintiff should recover, must go against the testator's estate, the executor is not a competent witness, unless called to testify by the opposite party, or by the court.

 APPEAL from the *Jefferson* Common Pleas.

FRAZER, J.—A motion is made in this court, by the appellee, to strike a bill of exceptions from the record, upon the ground that the same does not correctly state the evidence, and that the signature of the judge thereto was obtained by fraudulent representations, and that it was not filed in time.

We cannot enter upon such an inquiry. The transcript before us is properly certified, and we cannot undertake its correction, unless it has been changed since it was transmitted here, which is not pretended. We cannot make a record for any of the lower courts; that is their province, and all applications for its correction must be made to them. The bill appears by the transcript to have been filed in time, and we must so regard it. If an imperfect

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or incorrect transcript has been sent here, we can only, when that is shown, grant a writ of *certiorari*, to bring up a correct transcript. But we must act finally upon what has been done, and appears of record below.

Two questions only are presented for our consideration by the appellant.

1. A properly certified copy of an affidavit filed by the appellant in this court, as the basis of a motion in relation to a cause here, was permitted to go in evidence over his objection. This is claimed to be error, for the reason that it was irrelevant, and also because it was but a fragment, instead of the whole of a record. It was, as it turned out, wholly irrelevant, because it was in no manner connected with this case by any other evidence. It is impossible to perceive, therefore, how its admission in evidence could have injured the appellant. Other evidence might have existed which would have rendered it important, and we must suppose that the court admitted it for that reason, and we think that was proper. But inasmuch as it was not followed by that other evidence, it could, *per se*, have no proper influence upon the case, and we must presume that it had none. The other reason alleged against its admission, to-wit, that it was part of a record, and that the whole record ought to have been offered, is not a good one. It appears from the affidavit itself, that an appeal by *Thom* to this court had been dismissed, and that he wished it reinstated, but whether any motion to that end was ever made here does not appear. If not, then it was an isolated paper filed in this court. In that case, it did not belong to the case dismissed, for that was no longer *in fieri*, and it was no proper part of any record whatever.

This suit was by *Thom* and wife against *Wilson*, as executor, not upon a contract made with the executor. If the plaintiff had succeeded, the judgment would have been against the testator's estate. The executor offered himself as a witness to testify to conversations had by *Thom*

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after the death of the testator; the plaintiff objected; the court did not require him to testify, but, over the plaintiff's objection, he was permitted by the court to be sworn and give material evidence. This was plainly an error which must reverse the judgment. The act of 1861, 2 G. & H. 168, note 2, is as clear upon the subject as it is possible for language to be. It is thereby enacted, that "in all suits where an executor, administrator, or guardian, is a party, in a case where a judgment may be rendered either for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause, except in cases arising upon contracts made with the executor, administrator or guardian of such estate."

The judgment is reversed, with costs, and the cause remanded for a new trial.

W. Friedly, J. E. McDonald and A. L. Roache, for appellants.

C. E. Walker, for appellee.

CROSSLEY and Others v. O'BRIEN and Others.

VERDICT.—A verdict rendered in plain and defiant opposition to all the evidence ought instantly to be set aside.

HIGHWAY.—**PUBLIC UTILITY.**—In determining whether a proposed highway will be of public utility, though it is necessary to consider the wants of the particular neighborhood which desires it, yet the interests of the community outside of such neighborhood ought not to be disregarded.

SAME.—That cannot be deemed a highway of public utility which, if established, would render unfit for use another of much greater importance, (as, for example, an important line of railway,) or make the transit of passengers upon the latter seriously dangerous.

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SAME.—Even if the ground used for a railway owned by a private corporation might be appropriated, in whole, or in part, for a common highway, under the right of eminent domain, yet it cannot be thus appropriated without being paid for.

HIGHWAYS.—DAMAGES.—In deciding whether a proposed highway will be of public utility, the damages which, if it were established, would have to be paid for the land appropriated, ought to be taken into consideration.

SAME.—APPEAL.—On a petition to the county board for a highway, viewers were appointed, who reported that the road would not be of public utility, and assessed damages in favor of certain of the persons through whose lands it would pass. The board decided that the road should not be established, unless the petitioners would pay such damages. The petitioners then took an appeal to the Court of Common Pleas.

Held, that under section 26 of the highway act, (1 G. & H. 364,) the appeal would lie.

SAME.—PRACTICE.—In a proceeding to establish a highway, an objection that the names of the persons through whose lands it will pass are not sufficiently denoted in the petition, is waived if not made before the appointment of viewers, especially if not made by such persons themselves.

SAME.—INCLOSURES.—If the viewers appointed to lay out a highway find an "inclosure" on the route petitioned for, the owner of which will not consent that the road shall be located through it, and they ascertain that a good route for a road can be otherwise had, they cannot locate the road through such inclosure; nor can they locate it upon such other route, if such route would be an essential departure from the route mentioned in the petition.

SAME.—When the report of the viewers is silent concerning such an inclosure, it will be presumed that there is none, or that the owner has given the consent required.

SAME.—PRACTICE.—When the case has been appealed and tried by a jury, and a general verdict has been rendered for the petitioners, the same presumption will be entertained.

SAME.—Where inquiries whether a highway would be of public utility, and what damages, if any, should be allowed, were submitted to the jury, but the remonstrants did not ask that any question touching inclosures should be submitted,

Held, that no such question could be afterward raised.

SAME.—JURISDICTION.—The course of proceeding required by the statute when inclosures interfere, is not pre-requisite to the jurisdiction of the county board to establish a highway.

SAME.—Jurisdiction will not be deemed to have been acquired by the county board to establish a highway, unless the facts necessary to give the jurisdiction appear affirmatively on the record.

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SAME. — PRESUMPTION. — But when the jurisdiction has been obtained, the same presumption will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction.

APPEAL from the *Hamilton* Common Pleas.

FRAZER, J. — This was a petition for the establishment of a public highway. Upon remonstrance, the board of commissioners appointed reviewers, who reported that the proposed road would not be of public utility, and, also, assessed the damages of *John Crossley* at \$15, of *Gustavus H. Voss* at \$5, and the *P. & I. R. R. Co.* at \$100, and, thereupon, the board dismissed the petition, unless the petitioners would open and maintain the road at their own expense. The petitioners appealed to the Court of Common Pleas, where the question of the public utility of the road, and of the damages of the remonstrants, were submitted to a jury. The verdict was that the proposed road would be of public utility; that *Crossley's* damages would be \$20, and that neither *Voss* nor the railroad company would be entitled to any damages. Over a motion for a new trial by the remonstrants, there was judgment upon the verdict, and the remonstrants appeal to this court.

This judgment must be reversed. The verdict, upon the subject of damages especially, seems to have been rendered in utter defiance of all the evidence, and the court below should not have hesitated an instant to set it aside. Upon that subject there was no real conflict, and the evidence itself appears on its face so reasonable and obviously true, that we cannot doubt our duty. As to *Voss*, the evidence was that between four and five acres of his land, renting for \$4 per acre, would be occupied, and two thousand rails would be required to fence it. There is no evidence whatever that the road would benefit him. As to the railroad company, the proposed road is, for a distance of about two miles and three-quarters, to run ten feet from the east rail of the railroad, except where fills and grades will prevent, thus occupying thirty feet of their

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right of way, the use of a part of which is absolutely necessary for railroad purposes. In many places, the ditch would occupy all the space between the railroad and the proposed highway, rendering it impossible to fence for the protection of the railroad track. The property and trains of the company would thus be constantly endangered, and the use of its railroad be dangerous to passengers upon it. There is nothing whatever to indicate that the railroad company would derive any advantage from the proposed highway, nor is it easy to conceive how that would be possible. In such a state of facts, a verdict finding that the company would sustain no damage whatever, is surely not to be permitted to stand, unless the court is, in all cases, wholly to refuse to exercise that authority over the verdict which it is as much its duty, in a clear case, to exercise, as it is to try the case at all.

Upon the question of the utility of the proposed road, it appeared that it would be dangerous to the public to use it so near to the railroad; that there were other routes, equally eligible in other respects, free from that objection, and which would not interfere with the corporate franchises of the railroad company. Now in determining the question of utility, it is, of course, necessary and proper to consider the wants of a single neighborhood. But we must also look beyond that. It would be absurd to shut our eyes to the interests of the whole community outside of the particular neighborhood which needs the sought-for highway, and it would be impossible to say that that was a highway of public utility which would be of great convenience to the people of a small given territory, but the establishment of which would either render unfit for use another highway of vastly greater public importance, or put in serious danger the many thousands of people having occasion to use that other more important way. In a legal sense, this railroad is such a public highway, though owned by, and operated

for the profit of, a private corporation. It may be true that it is subject to the great sovereign right of eminent domain, and that it might be taken, from end to end, for a common public road, if it can be supposed to be possible that the public would, on the whole, be benefited thereby. But, in the very nature of things, that state of facts would scarcely exist, unless no other practicable route for such common road could be had. And so, under like necessity, and where the interests of the great public required it, it may be that the franchises of the corporation, to a greater or less extent, might be taken for public use, and appropriated to a common highway. But, in either case, the property of the corporation, like that of a citizen, must be paid for. The constitution of the state requires it, and neither courts nor juries have any power or right, in law or morals, to say otherwise. And then the amount of such compensation becomes, in the very nature of things, an element to be considered in determining the question of public utility. Will it cost the public more than it will be worth? In the case in hand, the evidence discloses no fact tending to show any necessity whatever for interference with the franchises of the corporation. So far as there is any evidence upon that subject, (and the *onus* was upon the petitioners,) it tends to show that another and a better location for the road could be had, which would equally well accommodate the neighborhood. But it is needless to pursue the subject. Enough has been said to show that, in view of the well settled doctrines of the law touching the matter, the finding of the jury upon the question of public utility was clearly against the evidence.

Whether existing law authorizes, under any circumstances, the taking of any part of the property of the *P. & I. R. R. Co.*, for a common highway, it is not necessary now to determine. Assuming that it may be taken, (an opinion to which we incline,) we have indicated, in general terms, the circumstances which would authorize

it, and that they necessarily enter into the question of the utility of the proposed highway.

A number of other questions are agitated in the briefs, which may be shortly disposed of.

We are of opinion that the petitioners had a right, under the statute, to appeal from the action of the board of commissioners, as they did. 1 G. & H., § 26, p. 364.

The petition represented that the lands of "— Weaver," and others named, would be affected by the proposed road. Inasmuch as it appears in the record, elsewhere, that the lands of three *Weavers*, *Michael*, *Benjamin* and *Peter*, all of whom are petitioners, would be affected, we think the defect in the original petition is cured; and, at any rate, objections of that character, if not made before the appointment of viewers, ought not, we think, to be entertained afterward, especially if made by other parties.

Section 16 of the highway act, 1 G. & H. 363, which prohibits the viewers from locating a highway through an inclosure, without the owner's consent, unless a good way cannot otherwise be had, is intended for the government of the viewers, and if they find such inclosure upon the route petitioned for, the owner of which does not so consent, and they find, upon examination, that a good route for a road can be otherwise had, the statute makes such facts an absolute bar to the establishment of a highway there, and the viewers are not possessed of a roving commission which gives them authority to locate a road in any place materially, if at all, different from that mentioned in the petition. The statute which requires them to locate it *on the best ground*, ought not to be held to authorize them essentially to depart from a definite route petitioned for. When the report is silent as to the interference of any such inclosure, it would be in accordance with the rule applicable in other cases, to assume that there was no such inclosure, or that the owner had given the requisite consent. When the case is appealed,

and tried by a jury, a general verdict for the petitioners ought to be regarded as covering that question. Where, as in this case, the questions of utility and of damages only are put to the jury, and the remonstrants do not ask that the question concerning inclosures shall be also submitted, we think it too late for them to raise any question about it afterward. The statute is silent as to the practice, and that which prevails in ordinary suits is not exactly applicable to the subject. But there must be a practice, and the sooner it is settled the better. It approaches very near to legislation to do it, and yet we cannot avoid it. That which we have indicated seems simple, furnishing an easy mode of reaching the merits, and giving little opportunity to defeat the establishment of highways, unless they ought to be defeated. We regard the course required by the statute, where inclosures interfere, as a thing not necessary to give jurisdiction, but a proceeding in the matter after the jurisdiction has been obtained. All the facts necessary to give jurisdiction in a road case must affirmatively appear by the record, else the jurisdiction will not be deemed to have been acquired. But, as to proceedings in the cause after jurisdiction to proceed has been obtained, the same presumption in support of their regularity will be indulged, as in ordinary cases with courts of general jurisdiction. This is a well established principle, and the conflict in the cases upon the subject, which must have perplexed every lawyer who has had occasion to examine them, has resulted from losing sight of the distinction between the facts required to entitle the tribunal to take jurisdiction, and those occurring afterward in the exercise of jurisdiction.

The judgment is reversed, with costs, and the cause remanded for a new trial.

G. H. Voss, T. A. Hendricks and O. B. Hord, for appellants.

D. Moss, J. O'Brien and B. K. Elliott, for appellees.

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150	9

CONTRACT.—RESCISSION.—An application for the rescission of a contract is addressed to the sound discretion of the court, but that discretion must be exercised in conformity to established principles. Page 339.

SAME.—FRAUD.—It is a general rule that a contract will not be rescinded, even for fraud, unless the contracting parties can be put in *status quo*, nor then, unless the application for a rescission be made within a reasonable time. Page 339.

SAME.—DILIGENCE.—A party who seeks the aid of the court to compel the rescission of a contract, for fraud, must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and that he has been prompt in seeking his remedy, after the facts constituting the fraud were discovered. The relief is granted to the vigilant, but denied to the negligent. Page 339.

SAME.—ENTIRETY OF CONTRACT.—Where real estate and personal property have been sold together, though a separate price may have been affixed to each, yet if the two sums were aggregated, and the contract was treated by the parties as an entirety, the vendee cannot rescind the contract as to the real estate, without offering also to restore the personal property. Page 340.

SAME.—STATU QUO.—Where a vendee of real estate has entered into and retained possession for a number of years, receiving the rents, changing the condition of the estate, and making lasting improvements, he cannot restore to the vendor what he received from him, and hence he cannot have a rescission of the contract. Page 340.

SAME.—TENDER OF DEED.—Where a vendee of real estate has received a conveyance, and has entered into possession, he must, if he seeks a rescission of the contract, tender to his vendor a reconveyance, and offer to restore to him the possession, before commencing his action. Page 340.

SAME.—FRAUD.—Suit by the vendee to rescind a conveyance of real estate, for fraud. The fraudulent representation was alleged to be, "that the vendor had a clear and undisputed title to the land," while, in fact, he did not then, nor at any time afterward, have a good and valid title. The deed contained a covenant that the vendor "was lawfully and solely possessed of the title to the land in fee simple," and the vendee had not been disturbed in his possession. *Quære*. Whether the facts alleged constituted such a fraud as would entitle the vendee to a rescission. Page 340.

SHERIFF'S SALE.—After the sale of the mortgaged premises, on a decree of foreclosure, a portion of the judgment remaining unpaid, the sheriff sold certain personal property of the execution defendant to satisfy the judgment. Subsequently, the sale of the real estate was set aside. Suit by the execution defendant to have the full value of the personal

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property credited on the decree of foreclosure, alleging that it had been illegally sold, and at a price greatly below its value.

Held, that if the sale of the personal property was illegal and void, the sheriff and the execution plaintiff, if he directed the sale, were liable as trespassers, but the execution defendant was not entitled to have his damages ascertained and credited on the decree. Page 842.

SUPPLEMENTAL COMPLAINT.—The office of the supplemental complaint is to bring upon the record such new facts as have occurred since the filing of the original complaint, in order that the court may grant the proper relief upon the facts existing at the time of the final decree. But if the original complaint is wholly defective, and without equity, so that no valid decree could be rendered upon it, the plaintiff cannot sustain his action by filing a supplemental complaint, though the latter may make a case which would entitle him to relief. The cause of action must have existed before the commencement of the suit. Page 843.

MULTIPLICITY OF SUITS.—Suit to enjoin the prosecution of an action to recover the possession of real estate, on the ground that the sheriff's sale, under which the plaintiff claimed, was illegal and void.

Held, that as the alleged illegality of the sheriff's sale could have been set up as a defense to the action for the possession of the land, a separate action would only be a useless multiplicity of suits, which ought not to be allowed. Page 844.

APPEAL from the Vigo Circuit Court.

ELLIOTT, C. J.—The appellant, on the 13th day of *February*, 1864, filed a complaint in the *Vigo* Circuit Court, against *Stewart*, the appellee, alleging, *inter alia*, that on the 20th day of *July*, 1855, said *Stewart* sold and conveyed to him one thousand acres of land, situated in *Vigo* county; for the sum of \$16,000, and also a large amount of stock and personal property, then on said land, for the further sum of \$3,000, making in the aggregate the sum of \$19,000, of which the plaintiff, at the time of the sale, and soon thereafter, paid to the defendant the sum of \$7,000, leaving unpaid the sum of \$12,000, for which he executed to *Stewart* his several promissory notes, payable as follows: \$3,000 due *April* 1st, 1857; \$3,000 due *April* 1st, 1858; \$2,000 due *April* 1st, 1859; \$2,000 due *April* 1st, 1860; \$2,000 due *April* 1st, 1861; all waiving the appraisement laws. And, at the same time, *Stewart* executed and delivered to the plaintiff a general warranty deed for said

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land, with a covenant that the grantor "was lawfully and solely possessed of the title thereto in fee simple." The plaintiff and his wife, at the same time, executed and delivered to the defendant a mortgage, on the whole of the land, to secure the payment of said several notes at maturity. That pursuant to said purchase the plaintiff took possession of the land and personal property, and still retains possession thereof; that on the 1st of *May*, 1857, he paid the defendant, on the first of the described notes, the sum of \$520 and, on the 18th of *April*, 1858, the further sum of \$2,100.

On the 29th of *January*, 1859, the plaintiff and his wife executed to the defendant their warrant of attorney, authorizing *Harvey D. Scott*, or any other attorney at law, to appear in the *Vigo* Circuit Court, and confess a judgment against the plaintiff for the balance of the purchase money then due on said notes, and for the foreclosure of the mortgage. That at the *March* term, 1859, of said court, a judgment was rendered by confession, on said warrant of attorney, against the plaintiff, for the amount due on the notes, and for a foreclosure of the equity of redemption, under said mortgage, and for the sale thereof, without the benefit of appraisal, and that, in the event the lands did not sell for a sum sufficient to satisfy said decree, interest and costs, the residue should be levied of any other property of the plaintiff; that on the 13th of *April*, 1859, and after the rendition of said decree, the appellant paid thereon the sum of \$1,500. That on the 4th of *December*, 1860, the defendant caused a certified copy of the decree, with an order of sale, to be issued by the clerk of said court to the sheriff of *Vigo* county, by virtue of which the sheriff advertised and sold the whole of said land, on the 9th day of *February*, 1861, to the defendant, for the sum of \$3,000, and executed to him a deed therefor. That the said sale by the sheriff was fraudulent and void, as the defendant well knew, yet he afterward, on the 25th of *February*, 1861, caused

and procured the sheriff to levy said decree, or order of sale, upon a large amount of personal property of the plaintiff, (a schedule of which is set out in the complaint,) of the aggregate value of \$1,985, which, on the 25th of *February*, 1861, the sheriff, by the direction and procurement of the defendant, sold and sacrificed for the sum of \$570 80, the defendant becoming the purchaser of a part thereof, whereby the whole of said personal property became lost to the plaintiff.

The complaint further alleges that the defendant brought an action in the *Vigo* Circuit Court, to recover the possession of said land from the plaintiff herein; that said action was tried in the *Clay* Circuit Court, at the *September* term thereof, 1863, upon which trial, it was adjudged and decreed by the court that the sale and conveyance of the land by the sheriff to the defendant was fraudulent and void, and that a judgment in said action was accordingly rendered by the court, in favor of the plaintiff and against the defendant, which remains in full force and unreversed. That since the rendition of said judgment, the defendant, without accounting to the plaintiff, or offering to account, for the value of the personal property so illegally sold, has caused the clerk of said *Vigo* Circuit Court, to issue another copy of the decree or order of sale to the sheriff of said county, and has ordered and directed said sheriff to offer the lands again for sale, according to the terms of said decree; that the sheriff has accordingly advertised the same for sale on the 13th day of *February*, 1864.

It is also alleged that, at the time of the sale of the land to the plaintiff, the defendant represented to the plaintiff "that he had a clear and undisputed title thereto," and that, confiding in the truth of said representation, the plaintiff "did not then investigate the title, nor require of the defendant an abstract of his title, nor the exhibition and delivery of his title deeds, but purchased the same solely upon the representation of said defendant, who

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then told said plaintiff that he had a good and perfect title, in fee simple, to the whole of said one thousand acres of land," and that "he never did investigate, or cause to be investigated, the title which said defendant had to said land, until since the said defendant has caused the said last order of sale to be issued and placed in the hands of the sheriff, and since the sheriff has advertised said lands for sale." It is further averred that *Stewart*, the defendant, "never had a good and valid title, in fee simple, to all of said lands, and that he well knew the fact at the time of the sale and conveyance thereof to the plaintiff; that said defendant had not, at the time of said sale, and never had, a good and valid title, in fee simple, to three hundred and twenty acres of said land," (which are particularly described,) and that said three hundred and twenty acres constitute an important and material part of said tract of one thousand acres; and that he would not have purchased the land if he had known, or believed, that the defendant did not have a good title to the whole tract. That on the 2d day of *February*, 1864, he made a proposition in writing to said defendant, "to the effect that inasmuch as he, (the defendant,) had deeded to him, (the plaintiff,) lands to which he had no title, to the extent of three hundred and twenty acres, the said contract of sale should be rescinded, by his reconveying to said defendant all the land which the defendant had conveyed to him, and accounting to said defendant for the reasonable rental value thereof while the same had been in his possession, and giving him, said defendant, possession of the same, upon condition that the said defendant should repay him, the said plaintiff, the said sum of \$11,120, with interest, and allow him for the improvements put upon said lands, of the value of \$3,000, and also allow him, said plaintiff, for the personal property which he, said defendant, had caused to be wrongfully sold as aforesaid, and consent to such rescission; and for the purpose of ascertaining how the accounts would stand

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between him and said defendant, upon such rescission, he proposed that two disinterested men should be chosen by him and said defendant, each choosing one, and they a third one, if said defendant thought fit, with an agreement that the matters in difference between them may be stated to the persons thus chosen, and they settle the rights of said plaintiff and said defendant, and that their award should be final." That said proposition was rejected by said defendant. "And said plaintiff now brings into court a deed, conveying all the interest of said plaintiff and wife in said lands, to said defendant."

The complaint prays for a rescission of the contract upon such conditions as the court may prescribe; or that the court decree that the value of said three hundred and twenty acres of land, at the rate of \$16 per acre, be deducted from the sum which the plaintiff agreed to pay the defendant for the whole tract, and that said amount be credited on the decree of foreclosure. That the defendant be also required to account for the full value of the personal property, which it is alleged was wrongfully and illegally sold by the sheriff, on said decree of foreclosure, and that the same be also credited on said decree.

The complaint is sworn to, and contains a prayer for an injunction against the defendant and the sheriff, restraining and enjoining a further sale of said lands under the decree of foreclosure, until the final hearing of the complaint.

The complaint was demurred to, for the reason that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer on the 16th day of *March*, 1864, and on the 19th of the same month, the plaintiff filed an amendment to his complaint, which alleges, in substance, that after the filing of the original complaint, an order was issued to the defendant, *Stewart*, and *Kern*, the sheriff, by the Hon. CHAMBERS Y. PATTERSON, Judge of the Common Pleas Court of said county, whereby they were temporarily restrained from selling the lands.

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named in the said original complaint, on the day fixed for said sale, in the notice given by the sheriff, and that on the 17th day of *February*, 1864, the Hon. SOLOMON CLAYPOOL, Judge of said *Vigo* Circuit Court, continued said temporary restraining order until the 20th of *February*, 1864. And that the said defendant, *Stewart*, procured the sheriff to offer and expose said land for sale under said decree of foreclosure, on the 22d of *February*, 1864, without having given any public notice thereof, either by publication in a newspaper, or by written notices publicly posted up in said county, and at a time when, from the want of said notice, there could be no competition in bidding for the land. That the whole of said lands, at said sale, were struck off by the sheriff to said defendant *Stewart*, for the sum of \$8,600. That said sale, for the want of any legal notice thereof, was illegal, fraudulent and void; but that said *Stewart* had procured the sheriff to execute to him a deed conveying to him the whole of said lands; that said *Stewart* had commenced an action in said *Vigo* Circuit Court to recover possession of said land, which was then pending and for trial at the then present term of said court. The amendment concludes with a prayer for an order against *Stewart*, restraining the prosecution of the action for the possession of the land, and that, on the final hearing, the court would set aside said sheriff's sale and conveyance of the land as fraudulent and void.

The court sustained a demurrer to the amended complaint, and rendered a final judgment thereon against the plaintiff for costs, to which ruling and judgment of the court the plaintiff excepted, and appealed to this court.

The question presented, therefore, is, did the court err in sustaining the demurrer to the amended complaint?

The appellant insists that, from the showing in the complaint, he is entitled to a rescission of the contract. The complaint is in the nature of a suit in chancery, and it is well settled that an application for the rescission of

a contract is addressed to the sound discretion of a court of chancery, but that discretion can be exercised in conformity to established principles. It is a general rule that a contract will not be rescinded, even for fraud, unless the contracting parties can be restored to the same situation occupied by them, respectively, when the contract was entered into, nor unless the application for a rescission be made within a reasonable time. *Cain v. Guthrie*, 8 Blackf. 409; *Johnson v. McLane*, 7 Blackf. 501; *Gatling v. Newell et al.*, 9 Ind. 572; *Barton et al. v. Simmons*, 14 Ind. 49.

A party who seeks the aid of the court to compel the rescission of a contract for fraud, must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and has been prompt in seeking his remedy within a reasonable time after the facts constituting the fraud are discovered. The relief is granted to the vigilant, but denied to the negligent.

Here, the alleged fraudulent representation as to the defendant's title was made, and the contract consummated, in 1855. The plaintiff admits, in his complaint, that, relying upon the defendant's representation that his title was clear and undisputed, he did not investigate the title at the time of the purchase, nor require of the defendant the exhibition of his title deeds, or an abstract of his title, and that he had never examined or investigated the title until within a few days prior to the filing of the complaint, on the 18th day of *February*, 1864, a period of over eight years after the date of the contract. During all this time, the plaintiff was in possession of the land. The records of the public offices, where the evidence of the defendant's title would likely be found, were of easy access, and open to his inspection, but he failed to examine them, or to use any other means to ascertain whether the representations of the defendant, as to the validity of his title, were true or false; and in the meantime, in 1859, he voluntarily executed a warrant of attorney, authorizing the confession of the judgment and the foreclosure of

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the mortgage, which he now seeks to enjoin. These facts not only fail to show diligence in ascertaining the condition of the defendant's title, such as entitles the plaintiff to claim a rescission of the contract, but, on the contrary, exhibit a case of extreme negligence, which forbids that such relief should be extended to him.

The complaint is bad for another reason. The land and the stock and personal property were sold at the same time, and, though a separate price was affixed to each, the sale of the one seems to have been an inducement to that of the other, and it was treated by the parties as an entire contract. The two sums were aggregated, and the amount paid was deducted from the aggregate, and the notes given for the residue, secured by the mortgage. The plaintiff does not offer to return the stock and personal property, nor is it probable that he could now do so. He even fails, in his complaint, in any manner, to offer to account for its value. Besides, he has been in the quiet and undisturbed possession of the land for over eight years, changing its condition, enjoying its rents and profits, and claims to have made lasting improvements on it, to the value of \$3,000, for which he claims that the defendant should be compelled to account. It is evident, therefore, that he cannot restore to the defendant what he received from him, or place him in the condition he was at the time of the contract, and he is not, therefore, entitled to a rescission.

There is yet another reason why the complaint is insufficient to entitle the plaintiff to a rescission of the contract. If the facts otherwise justified that relief, still he is not entitled to it, unless, before bringing his suit, he executed a reconveyance of the land, and tendered it to the defendant, and, at the same time, restored, or offered to restore, to him the possession. The complaint does not show that he did either. It is stated in the complaint that the plaintiff had executed such a conveyance, and brings it into court for the defendant, but there is no averment that it had

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been tendered to the defendant, while it is admitted in the complaint that the plaintiff still holds possession of the land, and refuses to yield it up to the defendant. He cannot insist on holding possession of the land, and, at the same time, claim a rescission of the contract. *Comparet v. Hedges*, 6 Blackf. 416; *Shaeffer v. Sleade*, 7 Blackf. 178; *Gatling v. Newell et al.*, *supra*; *Gaar v. Lockridge*, 9 Ind. 96, and the authorities there cited; *Cressey et al. v. Webb*, 17 Ind. 14. The proposition which it is alleged the plaintiff made to the defendant to rescind the contract, and settle the matter between the parties, does not aid the plaintiff's case. It demands greatly too much. It requires that the defendant should not only rescind the contract, but that he should refund to the plaintiff the entire amount paid by him thereon, with interest, without offering to account to the defendant for the \$3,000, the contract price of the personal property received and retained by the plaintiff. It also requires that the defendant should pay for the improvements made by the plaintiff on the land, and account for the full value of the personal property levied on and sold by the sheriff, as the plaintiff claims, illegally, and concludes by requiring that the defendant should agree to submit the settlement of all the matters to arbitrators. This is not an offer to place the defendant in *statu quo*.

We have examined the question, thus far, upon the hypothesis that the alleged representation of the defendant, that his title to the land "was clear and undisputed," taken in connection with the covenant in the deed, that he was "lawfully and solely possessed of the title to the land in fee simple," with the negative averment that the defendant did not then, or at any time thereafter, have a good and valid title, in fee simple, to three hundred and twenty acres of the land, constituted such a fraud as could entitle the plaintiff to a rescission of the contract, but we do not decide that question. The alleged representation asserts nothing more than is contained in the covenant

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in the deed. The plaintiff had a full opportunity of ascertaining the condition of the title by an examination of the record; he took possession of the land under his purchase, and has remained in the undisturbed and peaceable possession thereof ever since. It is not averred in the complaint that the defendant had no title whatever to the three hundred and twenty acres, but only that he did not have a good and valid title in fee simple. This averment may be true, and still the defendant may have had a valid title in equity, under which he could defend the possession; or he may have been seized of a less estate than an absolute fee. Under such circumstances, there is authority for saying that the plaintiff is not entitled to a rescission of the contract. See 2 Smith's Leading Cases, 167. But upon this point we decide nothing.

But the plaintiff insists that, if not entitled to have the contract rescinded, he is, at least, entitled to have the full value of the personal property, which it is averred the defendant unlawfully procured the sheriff to levy on and sell under the decree of foreclosure, (and which, it is alleged, was sold at a price greatly below its value,) credited on the decree.

If the judgment of the Circuit Court, declaring the sale of the land by the sheriff, under the order of sale, to be fraudulent and void, rendered the subsequent sale of the personal property also illegal and void, as is contended by the plaintiff, still we know of no authority that would authorize or justify the court in compelling the defendant to credit the value of it on the decree, and the plaintiff has referred us to none. If the levy and sale of the personal property were illegal and void, the sheriff cannot justify the act under the decree of foreclosure, and he and the defendant, if the latter directed the act, are, therefore, trespassers, and are liable, in a proper action, for damages. But the fact of such liability would not entitle the plaintiff to have such damages ascertained, and

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credited on the decree of foreclosure, or justify an order enjoining the collection of any portion of such decree.

The only remaining ground upon which the appellant claims that the demurrer to the complaint should have been overruled, is that the second sale of the land, made by the sheriff on the 22d of *February*, 1864, under the averments in the amendment to the complaint, is illegal and void, and that he is entitled to the relief prayed for in the amendment. The amendment to the complaint alleges that the sheriff advertised that the land would be offered for sale on the 18th of *February*, 1864, but that, under the original complaint, the sale was enjoined by temporary restraining orders of the court, until the 20th of *February*, and that the defendant fraudulently procured the sheriff to offer and expose it to sale on the 22d of the same month, without having first given any notice whatever of said sale, and that the defendant became the purchaser, for the sum of \$8,600. Under these averments, the sale was illegal and void. *Givan v. Doe ex dem. Crawford*, 5 Blackf. 260. The amendment is, in effect, a supplemental complaint, and contains the averment of facts which occurred after the filing of the original complaint. It might be valid as such, if it aided and supported the allegations in an original complaint that entitled the party to the equitable relief prayed for therein. The office of the supplemental complaint, in such a case, is to bring upon the record such new facts, that the court may grant the proper relief upon the facts existing at the time of the final decree. But if the original complaint is wholly defective, and without equity, so that no valid decree can be rendered on it, the plaintiff cannot, by filing a supplemental complaint founded upon matters which have taken place subsequent to the commencement of the suit, sustain the proceedings originally commenced. 1 Paige 169.

Here, as we have seen, the original complaint was defective, and under it the plaintiff could not sustain the action,

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and a demurrer had been sustained to it by the court below. If the amendment, therefore, can be sustained as entitling the plaintiff to any relief, it must be upon the ground that it contains within itself a valid cause of action, and, as the facts set up have occurred since the filing of the original complaint, they cannot be engrafted upon that complaint so as to sustain it, for the cause of action must have existed before the commencement of the suit.

But we do not think that the amendment contains any ground for the equitable relief prayed. It shows that, under the sheriff's sale, the defendant had procured a deed conveying to him the land, and had commenced an action, in the same court, for its possession, which is still pending and undisposed of. The right of the appellant to set up the facts alleged in his amended complaint, if true, as a defense to the appellee's action for the possession of the land, and to the same relief claimed under the amendment, is clear and undeniable. What benefit, then, can he derive by enjoining the prosecution of that suit, and trying the same facts that would properly arise under his defense therein, in an original action commenced by himself? We can conceive of none. And to sustain the complaint, under the amendment, if otherwise unobjectionable, would be to encourage a useless multiplicity of suits, which the law never justifies.

We think the demurrer was correctly sustained, and hence the judgment should be affirmed.

The judgment is affirmed, with costs.

J. P. Baird, R. W. Thompson and Scott & Pierce, for appellant.

Smith and Mack, for appellee.

GUY v. BARNES.

APPEAL from the *Morgan* Circuit Court.

RAY, J.—The appellee brought her action for the possession of certain real estate. A copy of a lease, by virtue of which appellee claimed possession, was filed with the complaint, and it was charged that the appellant had forcibly taken possession of the property leased. The descriptive portion of the lease is as follows: "Sixty acres of land, north of the state road leading from *Martinsville* to *Gasport*, three-quarters of a mile north of *Anderson Thompson's* residence, the west end of one hundred and twenty acres." The complaint alleged that the land, described accurately in the complaint, was the land leased to the appellee. A demurrer was overruled to the complaint. This we think was correct. The averment was sufficient. If, following the directions and distances indicated in the lease, sixty acres of land were found, being the west end of a one hundred and twenty acre lot, it would have been identified as the land mentioned in the lease.

An issue was formed, and a trial had, resulting in a finding in favor of the appellee. A motion for a new trial was overruled, and judgment rendered upon the finding. No proof was offered to identify, in the manner we have indicated, the land described in the lease as the same land mentioned in the complaint. The new trial should, therefore, have been granted.

The judgment is reversed, at appellee's costs, and a new trial ordered.

McNutt and *Ennis*, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

Noble v. Thompson.

NOBLE v. THOMPSON.

BILL OF EXCEPTIONS.—Where time has been given by the court to file a bill of exceptions, if the bill is not tendered, or further time given, within the time first limited, the record is beyond the reach of the court, unless the opposite party be brought in by notice.

SAME.—*Quæres*: Whether leave can be given, even after notice to the opposite party, to file a bill of exceptions after the time first fixed for filing it has expired.

APPEAL from the *Steuben* Common Pleas.

FRAZER, J.—This was replevin by the appellee against the appellant, for a quantity of unthreshed wheat, alleged to have been unlawfully detained.

Questions are presented upon instructions to the jury, given and refused by the court below. But the appellee contends that these questions are not in the record, for the reason that the bills of exceptions, by which the facts appear, were not filed in time. The circumstances were these: At the term at which the judgment was rendered, the appellant was allowed "until the first day of the next term," (*January, 1863*), to file his bills of exceptions; at that term, no step was taken until the *fifth* day of the term, when an entry was made continuing the cause, and giving until the next term to file the bills. On the second day of that term, (*May, 1863*), further time, until the last day of that term, was given, and the bills were filed within the time last limited. After the day first limited, the record does not show that the appellee was present, or had any knowledge of the subsequent proceedings.

The settling of bills of exceptions is a very important step in a cause, and never ought to be done without giving the adverse party an opportunity to be heard. Whilst the cause is pending, and until the expiration of the time given, the adversary party is in court, and must guard his interests at his peril. It seems reasonable, as tending to promote justice, that, during that period, the court

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might, for good cause, in term, enlarge the time first limited for filing a bill of exceptions, though this seems to have been doubted. *Harrison v. Price*, 22 Ind. 165. But where, as in this case, the time given expires without any step having been taken, or further indulgence obtained, it would be most unreasonable and oppressive to require the party to linger about the court for days, (and if for days, why not for weeks?) to watch the movements of his antagonist. No such thing, surely, is required by the law. If the bill be not tendered, or further time given therefor, within the time first limited after judgment, we think that the record of the case must then be regarded as beyond the reach of the court below, unless the opposite party be brought in by notice; and this is the practice where the correction of errors merely clerical is sought. We are not to be understood, however, as suggesting that, even by notice, could leave be obtained to get a bill of exceptions upon the record, after the time given for filing it had expired.

Inasmuch as the bills, in this case, cannot be regarded as any part of the record, the questions presented by the appellant are not in the case before us, and cannot, therefore, be now considered.

The judgment is affirmed, with costs.

D. E. Palmer, for appellant.

A. A. Chapin, for appellee.

HUNTINGTON and Another v. DRAKE.

INN-KEEPER.—LIABILITY OF.—Suit against the keeper of an inn, to recover the value of a watch lost by the plaintiff while a guest at the inn. There was evidence of negligence on the part of the plaintiff, but there was also evidence from which it might have been inferred that the watch was stolen by a servant of the inn-keeper.

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Held, that if the larceny was committed by his servant, the defendant was liable, and, after a finding for the plaintiff, it must be presumed, in support of it, that the fact was found to be that the loss resulted from the larceny of the servant.

NEW TRIAL.—PRACTICE.—An application for a new trial, made after judgment, and at a subsequent term of the court, must be regarded as an independent proceeding, and if the application is made on the ground of newly discovered evidence, the evidence given at the trial, together with the newly discovered evidence, must be set out.

APPEAL from the *Wayne* Common Pleas.

RAY, J.—The appellee brought this action for the value of a watch and chain lost while a guest at an inn kept by the appellant. Issues were formed, and a trial resulted in a finding for the appellee. A motion for a new trial was overruled, and this action of the court presents the first error assigned. There was evidence tending to show that the watch was taken from the satchel of appellee, left in her room, while she was in the supper room of the hotel. She had not locked the door of her room, although a key was placed in the lock when the room was assigned to her. There was evidence from which a jury or court might have found that the watch was taken from the room by the chambermaid employed about the hotel. In this view of the case, the appellants were liable for the value of the property taken, and, after verdict, we must regard this as the view taken by the court, sitting as a jury on the trial of the cause. The motion for a new trial was, therefore, correctly overruled. Judgment rendered upon the finding. At the next term of the court, the appellants moved again for a new trial, upon the affidavit of one of the parties, and also of the chambermaid engaged at the hotel at the time of the loss. The ground upon which the new trial was asked, was the newly discovered evidence of this servant. The evidence given on the former trial was not set out as a part of the foundation of the motion, and the court could not determine, therefore, from the papers presented in support of the motion, whether the newly discovered evidence was cumulative simply, or

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whether it would probably have changed the result had a new trial been granted.

The appellants attempted to fasten this application upon the former proceedings, which had already resulted in a judgment, and was no longer pending in the court. The application, when made after judgment, and at a subsequent term of the court, must be regarded as an independent proceeding, and must set out the evidence given at the former trial, with the newly discovered evidence. This course was very plainly indicated in the opinion rendered in the cases of *Cox v. Hutchings*, 21 Ind. 219, and *Glidevell v. Daggy*, *id.* 95, and, in our judgment, is the correct method.

The judgment is affirmed, at the costs of the appellant, with 5 per cent. damages.

J. P. Siddall and J. Railsback, for appellants.

J. C. Whitridge and G. Holland, for appellee.

DUCK v. ABBOTT.

PARTNERSHIP.—Before the adoption of our present code, one partner could not sue another at law, to recover money claimed to be due on the unsettled partnership accounts, but since the distinction between law and equity has been abolished, this rule can have no application.

PRACTICE.—PARTIES.—A, B and C, having been engaged in a partnership business, A sued B for his share of the profits, which he alleged to be in B's hands. The complaint did not aver a dissolution, and an adjustment of the balances between the partners. *Held*, that C was a necessary party.

APPEAL from the *Dearborn* Circuit Court.

ELLIOTT, C. J.—*Abbott*, the appellee, sued *Duck*, the appellant, before a justice of the peace, on an account, for his interest in the proceeds of the sale of sacks, in the hands of *Duck*, and recovered a judgment. The case was appealed by *Duck* to the Circuit Court.

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In the Circuit Court, upon a motion being made by the defendant below to dismiss the suit for want of a sufficient cause of action, the plaintiff, by leave of the court, filed an amended cause of action, in which it is averred that, in 1862, the plaintiff and defendant, and one *John C. Craig*, entered into a partnership for the purpose of buying and selling sacks; that by their agreement, the defendant was to furnish the capital, *Craig* was to attend to the buying, and the plaintiff was to repair the sacks, and attend to the sale of them. *Craig* was to receive one-fourth of the profits, and the residue of the profits was to be equally divided between the plaintiff and the defendant. An account is then stated, showing the number of sacks purchased, and their cost; the amount for which they were sold; the amount of the expenses of the partnership; the amount of net profits realized, and the share of each partner, the plaintiff's share being \$149 25. It is also averred that the full amount of the proceeds of said sale came to the hands of the defendant (*Duck*) and that on demand he refused to pay the plaintiff the money so due to him. The defendant demurred to the amended complaint, for the want of proper parties, claiming that *Craig* should have been made a party to the suit. The court overruled the demurrer. The trial of the cause resulted in a finding and judgment for the plaintiff.

The only error assigned is the ruling of the court in overruling the demurrer to the complaint. Anterior to our present code, one partner could not sue another at law, to recover money claimed to be due on the unsettled partnership accounts, but since the distinction between law and equity has been abolished, the rule can have no application. Here, the complaint states the account, shows the amount due to the plaintiff, and alleges that the whole amount of the partnership assets is in the hands of the defendant. Under this showing, the appellee insists that he has no cause of action against *Craig*, and was not entitled to a judgment against him; that he only seeks to

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recover his individual share of the profits of the partnership in the hands of the defendant, and that, in that share, *Craig* had no interest, and, therefore, *Craig* was not a necessary party. We cannot sustain this view of the case. The partnership consisted of three persons; the complaint does not show that there had been a settlement between them, and the amount due each ascertained; it does not even show that the partnership had terminated by the time limited for its continuance, or that it had been dissolved. It assumes that a certain per cent. of the net profits was due to the plaintiff, and seeks to litigate that question with *Duck* alone. *Craig* was certainly an interested party in the proper settlement of the question. Not being a party to the suit, he would not be bound by the judgment, or the conclusion of the court or jury as to the terms of the partnership, or the amount of net profits, and *Duck*, therefore, might be compelled to litigate the question over again with *Craig*. For these reasons, we think *Craig* should have been made a party defendant. If the complaint filed before the justice had shown the partnership, and the defendant had gone to trial upon the merits, without making any objection for the want of proper parties, it might have been too late to raise the objection, for the first time, in the Circuit Court. But the partnership was averred in the amended complaint filed in the latter court, and not in the original complaint before the justice, and the objection, therefore, was properly raised in the Circuit Court by demurrer. The court erred in overruling the demurrer to the complaint, and for that error the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded to the Circuit Court, with instructions to sustain the demurrer to the complaint, and permit the plaintiff below to amend his complaint and make *Craig* a party defendant.

D. S. Major, for appellant.

W. S. Holman, for appellee.

Hays v. Seward, Administrator of Hays.

HAYS v. SEWARD, Administrator of HAYS.

CONTRACT.—A, by his will, devised his real estate to his wife for life. After the death of A, his widow continued to live upon the land with her children, the eldest son, B, taking the management of the land, and the whole family receiving their support from the common earnings, and living together as one family. After the death of B, the widow filed her claim against his estate for the rents of the farm, and for services in keeping house for him.

Held, that as the evidence failed to show any contract, express or implied, on the part of B, to rent the farm, or to pay his mother for her services, she was not entitled to recover.

Held, also, that as B was a minor at the death of his father, and continued to live with his mother after he attained his majority, as a member of her family, she was not entitled to recover for his board, or he for his labor, without an agreement to that effect.

APPEAL from the *Madison* Common Pleas.

ELLIOTT, C. J.—The appellant filed a claim in the Common Pleas Court, against the estate of *John Hays*, deceased, as follows:

“The estate of *John Hays*, deceased, Dr. to *Hannah Hays*.

<i>June 16, 1863.</i> —To rent of farm of which <i>Silas</i>	
<i>Hays</i> died seized, - - - -	\$1,416 00
To labor in keeping house for <i>John Hays</i> , deceased, - - - -	584 00
	<hr/> \$2,000 00

The account was verified by an affidavit.

The appellee, the administrator of the estate, appeared and filed an answer of several paragraphs, viz:

1. The general denial.
2. Payment.
3. The statute of limitations.
4. Set-off.

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Replication in denial of the second, third and fourth paragraphs.

Trial by jury; finding and judgment for the defendant. Exceptions were properly taken to the overruling of a motion by the plaintiff for a new trial. The evidence is in the record, and shows that *Silas Hays*, the husband of the appellant, died seized of a farm, on which he resided, in *Madison* county, in *December*, 1848, leaving a family consisting of his widow, (the appellant,) two sons, *John* and *Seth*, and four daughters. By his last will, he devised his farm, consisting of eighty acres, to the appellant during her widowhood, and, at her marriage or death, to his two sons, *John* and *Seth*, in fee, they paying to each of his four daughters \$100, within one year after the marriage or death of his widow.

John was the elder of the two sons, and had superintended his father's business for some time before his death, though he was only of the age of eighteen or nineteen years when his father died.

The appellant and her six children continued to live on the farm after the death of *Silas*. *John*, being the elder of the two sons, took the control and management of the stock and farming operations, and he and *Seth* performed the labor on the farm. The appellant had charge of the household affairs, and was assisted in her labor by her daughters. Thus they all continued to live together on the farm as one family. All received their support from the common earnings, without any special contract or agreement, and without any account or charges being kept or made. The three elder daughters married within three years next succeeding the death of their father, and moved from the farm, after which the appellant and her remaining daughter kept the house, until the death of *John* in 1863.

Some years after the death of his father, *John* purchased eighty acres of land, adjoining the homestead, for \$500, a part of which, at least, was paid from the earnings on the farm. *John* and *Seth*, before the death of the former, cleared and put in cultivation the residue of the

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eighty acres of land constituting the homestead. The evidence further shows that *John* intended to give *Seth* the benefit of one-half of the eighty acres of land that he had purchased, by ultimately dividing the whole one hundred and sixty acres equally between them, but he was taken sick and died when *Seth* was absent from home, and his intention in reference to the land was not executed.

There is nothing in the evidence from which an inference can be drawn that *John* rented the farm of his mother, or had, in any legal sense, the possession of it. He was a member of his mother's family, the same as each of her other children. The land was hers during her life, and she was in possession of and lived on it, with her children, as one family, in harmony. All were industrious, and were supported in comfort.

The evidence does not show that *John* had the possession of the farm, and had hired his mother to keep house for him, either by express contract, or implication, nor that she had agreed to pay him for his labor on the farm.

The only questions presented for our consideration arise upon the instructions given by the court to the jury.

The court instructed the jury that: 1. "In order to entitle the plaintiff to recover on the first item of her account, she must establish, by a preponderance of the evidence, that *John Hays* had the use and occupancy of the farm by contract, express or implied."

2. "In order to entitle the plaintiff to recover on the second item in her account, she must prove that she was keeping house for *John Hays*, at his instance and request. If so, the law would imply a promise on his part to pay what such services were worth."

These instructions seem to contain a proper enunciation of the law. They were certainly pertinent to the issue and evidence in the case, and were, therefore, properly given.

The court also instructed the jury as follows: "If you find, from the evidence, that the deceased, at the time of

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his father's death, was a minor, under the age of twenty-one years, and remained with his mother, the plaintiff, for a number of years after he attained the age of twenty-one years, without any agreement as to wages for his labor, and no agreement that he was to pay for his board, the plaintiff cannot recover, in this case, for work and labor in keeping house for said *John*."

We think there is no valid objection to this instruction. The appellant's counsel concedes that if the son had lived with the *father*, under the circumstances stated in the instruction, the law would be as stated, but does not think the rule applicable in the case at bar, as here the son was living with his *mother*. No authority is referred to, or reason given for the distinction, and we do not think any exists. There was no error in giving the instruction.

Other instructions were given and excepted to, but no point is made upon them in the appellant's brief, and they seem to be unobjectionable.

The verdict is clearly sustained by the evidence, and we think the judgment should be affirmed.

The judgment is affirmed, with costs.

W. R. Pierce and *H. D. Thompson*, for appellant.

J. W. Sansberry and *J. W. Davis*, for appellee.

JENNESS v. JENNESS.

HUSBAND AND WIFE.—DOMICIL.—The general rule is that the domicile of the wife is determined by that of the husband. This rule results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. Page 357.

SAME.—JURISDICTION.—But where there has been a final separation of husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of the wife, so as to confer, or oust, the jurisdiction in a suit for divorce. Page 358.

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SAME.—CROSS-PETITION.—It is not necessary, under our statute, that the defendant, in an action for divorce, should be a resident of this State, in order to file his cross petition, and obtain the affirmative relief which it may authorize.

APPEAL from the *Miami* Circuit Court.

FRAZER, J.—The appellant filed his petition against the appellee, his wife, for divorce. The wife answered, and also filed a cross-petition, praying a divorce in her own behalf, and thereupon the appellant dismissed his petition, and answered the cross-petition by a general denial. Upon trial, the court found the facts specially, and its conclusions of law thereon, and decreed a divorce to the wife, with \$800 dollars as alimony. The husband appeals. The special findings, so far as need be set forth to exhibit the questions before us, are as follows :

That the parties were lawfully married some eighteen or twenty years ago ; that they have never had a child ; that the wife has, for most of the time since her marriage, been an invalid ; that the plaintiff was guilty of mistreating her, as charged in the cross-petition, and that she is entitled to a divorce and \$800 alimony ; that she resolved three years ago last fall, to part from him, and go to live with her father and brother, in the State of *Pennsylvania*, and accordingly left at that time with her father, and has been living ever since with her father and brother, in that state, without any intention of returning to this state to reside here ; that she never did return, except to defend this suit, last fall, and at the present time, and to prosecute her cross-petition, and intends to return to that state on the conclusion of the present trial, and the conclusions of law upon these facts are :

1. That the court has jurisdiction to try and determine the cross-petition, by reason of having acquired jurisdiction to try the petition of the plaintiff, and that the dismissal of that petition does not oust that jurisdiction, and that it was not necessary for the wife to allege or prove that she

was a *bona fide* resident of the state for one year previous to filing said cross petition.

2. That if it were necessary, the wife has not lost her domicile in *Miami* county, *Indiana*, by reason of her residence in *Pennsylvania*, and is to be deemed and taken as a resident of the same county with her husband, (because of his domicile here,) and for the purposes of this suit.

Proper exceptions to the conclusions of law of the court below, present two questions for our determination.

1. In case of final separation of husband and wife, and their actual permanent residence in different states, is the domicile of the husband to be regarded as fixing that of the wife, so as to confer jurisdiction in a divorce case?

In the view we entertain of the case before us, this question is not now important. But it is in the record, and has been argued by counsel, and it is probably our duty now to decide it.

The general rule undoubtedly is that the domicile of the wife is determined by that of her husband. This rule results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. But it is argued, on behalf of the appellant, that the identity of domicile is a presumption which may be rebutted in a divorce case; that any act of the husband which entitles the wife to a divorce, immediately discharges her from any obligation to dwell with him; that, in such a case, she *must* separate from him to preserve her legal rights, or the cohabitation will be a condonation of the act; and that when the duty of dwelling together ceases, the presumption must also cease.

There is much force in this argument, and it is not without direct authority to support it. In *Schonwald v. Schonwald*, 2 Jones Eq. R. (N. C.) 367, it was held that "the maxim that the domicile of the wife follows that of the husband cannot be applied to give jurisdiction." And it was decided that, at any rate, the statute of *North*

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Carolina, requiring three years residence there before a party could sue for divorce, meant actual residence; a living there in fact; that any other construction would defeat the purpose of the statute, which was to prevent the residents of other states from obtaining, in the courts of that state, divorces when they could not obtain them at home. But precisely the contrary doctrine has been held in *Massachusetts*. In *Greene v. Greene*, 11 Pick. 410, the husband, while residing in *Rhode Island*, abandoned his wife, and removed to *Massachusetts*, she continuing for five years to reside in *Rhode Island*, when she went to the county of his domicil in *Massachusetts*, and immediately sued for a divorce *a mensa et thoro*. The statute required a residence in *Massachusetts* to give jurisdiction. The jurisdiction was sustained, upon the ground that the domicil of the husband, as a matter of law, determines that of the wife. But in *Harteau v. Harteau*, 14 Pick. 181, the wife, after being deserted by her husband in *New York*, returned to her former home in *Massachusetts* to live, and afterward filed her libel there for divorce, the husband still retaining his domicil in *New York*. A decree was refused for want of jurisdiction, upon other grounds, but it was ruled that the maxim, "that the domicil of the wife follows that of the husband," cannot be applied in such a case to oust the court of jurisdiction; that the law will recognize the wife as having a separate existence, separate interests, and separate rights, in those cases where the object of the proceedings is to show that the marriage relation itself ought to be dissolved; otherwise the parties would stand on very unequal grounds, as the husband could change his own domicil at will, and thus, in many cases, deprive the wife of all opportunity of enforcing her rights. In full accord with this doctrine is the case, in our own state, decided at an earlier date, of *Tolen v. Tolen*, 2 Blackf. 407. In that case, the parties resided in *Kentucky* when the cause of divorce arose. The wife afterward removed to this state, *animo manendi*, and brought her suit for divorce,

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the husband never having resided here; and it was held that the court had jurisdiction. The doctrine of that case has been universally adopted in practice here ever since, and it must be considered settled. It is a denial of the most essential municipal authority, to say that a state has no jurisdiction to determine, according to its laws, the social *status* of the people residing, in good faith, within it; and in doing so, it may, perhaps, incidentally affect that of people dwelling in other states. There is no principle upon which the two *Massachusetts* cases above mentioned can be reconciled, unless it be that the wife, for the purposes of such a suit, may have two domicils in separate states, either of which gives jurisdiction. With great respect for a court always ranking among the very first for the profound learning and high character of judges composing it, we cannot assent to this proposition. Under a statute like ours, especially, which requires a *bona fide* residence here for a given time to confer jurisdiction in the first instance, we must forget the purpose of the statute itself, and the just limits which the universally recognized principles of public law impose upon every state, in exercising the power of regulating the domestic relations, before we can be prepared to hold that one who never dwelt here, is at liberty to appeal to our court as a plaintiff seeking divorce. To do so would be to substitute a constructive residence for that actual *bona fide* dwelling here, *animo manendi*, which it was the purpose of our legislature to require.

2. The remaining question depends upon the construction to be given to our statute of divorces. It is, whether upon cross-petition by a non-resident, our courts have jurisdiction to grant divorce, where the original cause was within the jurisdiction?

Section 6 of our divorce act provides that "divorces may be decreed," &c., "on petition filed by any person who, at the time," &c., "shall have been a *bona fide* resident of the state one year previous to the filing of the same, and a

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bona fide resident of the county at the time of filing such petition." By the eleventh section a mode is provided for giving notice to the defendant when not a resident of this state, and by section 14 it is enacted that, "in addition to an answer, the defendant may file a cross-petition for divorce, and when filed, the court shall decree the divorce to the party legally entitled to the same. If the original petition be dismissed after the filing of a cross-petition, the defendant may proceed to the trial of the cross-petition, without further notice to the adverse party." These provisions must be construed together, and if it can reasonably be done, full effect must be given to each of them.

A brief review of our recent legislation concerning divorces may aid us. In 1852, we permitted any resident of the county to apply to our courts, in that county, for a divorce, and his own affidavit of such residence was made, *prima facie*, sufficient evidence of it. Under that act, such monstrous abuses were practiced, to the injury of unsuspecting husbands and wives, in other states, that our statute became a reproach to us abroad. The mischief was, not that parties residing elsewhere came to the domicils of their husbands or wives here, and, in response to their applications for divorce, obtained decrees on their own behalf, on cross-petitions filed. Quite otherwise. It was that persons from other states, leaving home upon pretended visits of business or pleasure, never intending to domicil here, and, in many cases, not remaining a day among us, and sometimes not even entering our borders at all, had, by the barest frauds and perjuries, procured divorces in our courts. As the fourteenth section then stood, the dismissal of the petition carried the cross-petition with it, and enabled a plaintiff, who must be defeated by the resident or non-resident defendant upon cross-petition, by dismissing his petition as often as a cross-petition was filed, to annoy and perhaps exhaust the defendant so that finally no defense would be made. In a

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case like the one before us, where the defendant is a wife residing in a distant state, it is easy to see that this consequence might easily be, and how non-resident defendants might be outraged. The protection of the rights of the people of other states, and a regard for the good name of our own state abroad, demanded imperatively that both sections 6 and 14 should be amended so as to shut the door against these mischiefs and abuses; and, accordingly, they were amended in 1859, and put in the form which we have copied in a preceding part of this opinion. It is due to our character as a state to say that this remedial legislation has put an effectual check upon the pre-existing state of affairs, and that it is believed that the judges of our *nisi prius* courts, by being careful to require proof of the facts which give jurisdiction, and our prosecuting attorneys, by vigilance in opposing divorces, as the law requires, whenever the defendant makes default, are quite as successful in preventing the fraudulent practices of which we have spoken, as are the tribunals of most of our sister states. If these continue, they will be chargeable, not to our laws, but to those who are intrusted with their administration.

It must be quite apparent that to hold the requirement of a year's residence applicable to defendants, as well as petitioners, is not only to give section 6 a construction not required by its language, but also to make it conflict with the general terms of section 14. Nor is this all. A consequence would be, that in two cases precisely alike in their facts, the defendant in one being a resident, and in the other a non-resident, the former might result in a decree for divorce on cross-petition, with such alimony as ought to be given where the plaintiff is in fault; while in the latter, that vindication of character which can often be secured only by a decree, could not be had by the defendant, nor could the alimony be adjusted upon the basis of the fact that the defendant was the party

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aggrieved. Such a discrimination against non-resident defendants finds no place within the letter of the statute, still less in its spirit, and a construction which would allow it, would invite, in the class of cases in which they could be most successfully perpetrated, the very worst abuses, which the amendment of section 14 was intended to prevent.

So far as the decree affects the *status* of the plaintiff, who is a resident, and imposes upon him a pecuniary liability for the alimony allowed, which will be effective here, we suppose there can be no doubt that it was competent for an *Indiana* court to go, if it proceeded according to our laws. Whether the courts of *Pennsylvania* will regard the social condition of the defendant as having been changed, is not a question for us. It is to be regretted, however, that questions of that class have not been always dealt with upon general principles of public law, rather than maxims of local policy.

Upon the question in hand, we concur with the learned judge below, in his conclusion of law, "that the Circuit Court had jurisdiction to try and determine the cross-petition," &c., "and that it was not necessary for the defendant to prove that she was a *bona fide* resident of this state for one year previous to filing said cross-petition."

Thus, while our statute is intended to prevent non-residents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by coming here to petition for divorces, it, at the same time, arms them with every weapon of defense which is afforded to our own people, when brought into court at the suit of those whose *bona fide* residence here gives us jurisdiction. As we construe the statute, section 14 is the complement of section 6, and both together are well calculated to protect non-residents, prevent abuses, and promote the enlightened administration of justice in divorce cases.

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The judgment is affirmed, with 1 per cent. damages and costs.

D. D. Pratt and D. P. Baldwin, for appellant.

Dickey and Blake, for appellee.

FOSTER, Administrator of NAVE, v. POTTER and Others.

REVIEW. — PRACTICE. — Complaint by the defendant to review a judgment rendered against him by default in the *Fountain* Circuit Court. After the complaint was answered, the court set aside the default and judgment, on motion, and allowed an answer to be filed in the original cause. After this last answer was filed, the venue of the action for review was changed to the *Tippecanoe* Circuit Court, and, in the latter court, a motion was made and sustained to strike out the answer filed in the original cause, and to vacate the order setting aside the default and judgment. Leave was then granted to amend the complaint for review, and, upon the amended complaint, an order was entered setting aside the original judgment. A demurrer was then sustained to the original complaint, and final judgment rendered for the defendant.

Held, that the *Tippecanoe* Circuit Court had authority to act upon the motion to vacate the order of the *Fountain* Circuit Court, setting aside the judgment.

Held, also, that the order of the *Fountain* Circuit Court, setting aside the judgment, was erroneous, first, because at the time the order was made on mere motion, there was an issue of fact pending upon the complaint for review; and, secondly, because the complaint for review, if regarded as a motion for relief, under section 99 of the code, came too late, more than one year having elapsed since the rendition of the judgment.

Held, also, that though the original complaint for review did not make a case which would have authorized a review of the judgment, but, at most, only disclosed facts which would have entitled the party to relief on motion within one year, still, as it purported on its face to be a complaint for review, and was so treated by the parties, by changing the venue, it must be held to have been a proceeding under the statute for the review of a judgment, and, hence, leave was properly granted to amend the complaint.

APPEAL from the *Tippecanoe* Circuit Court.

FRAZER, J. — This was a complaint praying for a review of a judgment rendered by default in the *Fountain* Circuit

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Court, in favor of *Nave*, against the appellees. Upon this complaint, after it was answered, the *Fountain* Circuit Court set aside the default and judgment, on motion, and let the defendants to the judgment in to plead to the complaint in that case. They then answered the complaint in the original cause, after which, as we read the record, the venue in the case for review was changed to the *Tippecanoe* Circuit Court. In the latter court, a motion was sustained to strike out the answer filed in the original cause, and to vacate the order setting aside the original judgment. Thereupon, the plaintiffs in the complaint for review, obtained leave to amend that complaint, "so as to make it a complaint for review," in the language of the record. A demurrer to the complaint so amended was overruled, and, upon a refusal to answer further, the court reversed and set aside the original judgment. A demurrer was then filed to the complaint in the original cause, which was sustained, and final judgment rendered thereon. *Nave* appealed, and having since died, his administrator prosecutes the appeal.

The appellant presents for our consideration the question, whether the *Tippecanoe* Circuit Court erred in giving leave to amend the complaint for review, and the appellee, by a cross-error, questions the action of that court in setting aside the order of the *Fountain* Circuit Court, vacating the original judgment. It will be seen, therefore, that we are not called upon to consider some very novel questions which might have been raised upon the record before us.

After the *Fountain* Circuit Court had vacated the judgment sought to be reviewed, on motion in the case for review, there was little else to be accomplished by that case. A judgment for the costs of it only remained to be rendered to bring it to a close. But before that was done, the venue was changed, an affidavit therefor having been waived. Upon reaching the *Tippecanoe* Circuit Court, it was surely proper for that court to act upon a motion to set aside the order which had been irregularly made to

vacate the original judgment. When that order was made on mere motion, there was an issue of fact pending upon the complaint for review. Besides, the facts contained in that complaint were not sufficient, if true, to justify a review. If the complaint be regarded as a motion for relief, under section 99 of the code, from the consequences of excusable neglect, (and nothing else was averred therein,) then the action of the *Fountain* Circuit Court was unauthorized, because it was not done within a year from the rendition of the original judgment. If the venue had not been changed, it can hardly be doubted that that court might have corrected its own mistake, and it is equally clear that the court to which the venue was changed was possessed of the same power. This disposes of the question presented by the appellee.

When the *Tippecanoe* Circuit Court set aside the irregular order of the *Fountain* Circuit Court, the case was then before it, as if that order had never been made, and the authority of the court to give leave to amend the complaint is expressly conferred by sections 97 and 591 of the code.

But it is contended that the proceeding brought to *Tippecanoe* county was an application for relief under section 119, and that the amendment made, introducing new matter, making a proper case for review, was, in fact, the commencement of a suit for review, which must have been commenced in the court where the original judgment was rendered, and could not be pleaded in the *Tippecanoe* Circuit Court. 2 G. & H. 279. We cannot adopt that view of the complaint filed in the *Fountain* Circuit Court. It is true, as already stated, that the facts averred in it were not sufficient to obtain a review; at most, they would have only justified an application for relief under section 99. But that application is summary, by mere motion, upon a necessary showing, requires no complaint or pleadings, is made in the original cause, and, inasmuch as there could be no trial by jury upon it, there could be no foundation for a change of venue to another county, upon

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the application of either party. In this case, the complaint purported on its face to be for a review, and such was its prayer; both parties treated it as such by making up issues, and the appellant by moving for, and obtaining, a change of the venue, and by removing to *Tippecanoe* county the record of this, as a separate cause. Under such circumstances, we think that we must regard it, not as a mere motion in the original cause, but as an action for review. That the complaint did not state sufficient facts for the purpose for which it was intended, cannot, we think, justify us in holding that the cause was different from what it purported to be, and from what the appellant himself treated it as being, though it is true, as appears from the record, that the appellees, at times, regarded it as a mere motion. In this view, it is quite apparent that the action of the *Tippecanoe* Circuit Court, in allowing the amendment, was not erroneous.

The judgment is affirmed, with costs.

J. M. La Rue and *A. J. Roush*, for appellant.

S. A. Huff and *R. Jones*, for appellee.

PICKETT v. THE STATE, on the relation of the Board of Commissioners of Hamilton County.

PLEADING.—Suit against A and his sureties, on a bond given by A as county treasurer. The complaint alleged that A, as such treasurer, had received the sum of \$2,000, which he had failed, on request, to pay over to his successor in office.

Held, that the complaint was bad, for failing to show that the money sued for remained in the hands of A at the expiration of his term of office, and had not been paid out by him, on warrants properly drawn upon him, during his continuance in office.

Held, also, that as the suit was upon the bond, and not against the treasurer for money collected in his official capacity and not paid over, it was barred by the statute of limitations, after three years from the expiration of A's term.

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APPEAL from the *Howard* Circuit Court.

FRAZER, J.—This was a complaint against the appellant and his sureties, upon his bond as county treasurer. Upon a demurrer to the answer of the sureties having been overruled, the plaintiff refused to reply, and, thereupon, the sureties had judgment. The case was, however, proceeded with against *Pickett* alone, and resulted in a judgment against him for \$1,868 40, from which he appeals.

The complaint alleges that, on the 4th of *September*, 1855, the appellant and his sureties entered into a bond payable to the State, in the penalty of \$50,000, which is filed with the complaint. The condition of the bond is, "that if the above bound *Elihu Pickett*, who has been elected treasurer of said county of *Hamilton*, will pay over all moneys, which shall come into his hands for state, county, school, road, railroad, and all other purposes, and shall well, faithfully and promptly discharge all the duties of said office of county treasurer for the said county of *Hamilton*, according to law, then this obligation shall be void," &c. The complaint assigns for "breach in said bond, that said *Pickett* did not well, faithfully and promptly discharge all the duties of said office; that on the — day of *October*, 1856, one *Jacob B. Loher* was elected treasurer of said county, and, on the 7th of *September*, 1857, duly qualified and entered upon the duties of said office, as the successor of *Pickett*; that the sum of \$2,000 had come into the hands of said *Pickett*, as such treasurer, for state, county, school, road, railroad, and other purposes, which he, though requested, failed, and still fails, to pay to his said successor, &c.

The first question presented arises upon the action of the court below in overruling a demurrer by *Pickett* to the complaint.

The appellant argues that the complaint is bad, because it does not show a state of facts making it his duty to pay the money to his successor; as that the money remained in his hands when he went out of office; that the duty to pay

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to his successor does not result from the mere fact that the money came into his hands, because he was bound by law to pay it out upon proper warrants, drawn upon him from time to time; that hence the complaint did not show him to be in default. This argument cannot be successfully met. We know, as a matter of law, that state, school, road, and other moneys, are required to be disbursed by the county treasurer, from time to time, to the proper officers, and we must presume, in the absence of averments to the contrary, that the proper warrants were drawn therefor, as the law requires, and that school trustees, supervisors, &c., whose duty it was to receive and expend the funds, did present such warrants, and that the treasurer paid them, as it was his duty to do. So that it does not result, because money comes into the hands of the treasurer, that it is his duty to pay it to his successor. Whenever the complaint is for failure to pay to his successor, it ought to be alleged that the money remained in his hands at the expiration of his term. We think it is very clear, therefore, that the court erred in overruling the demurrer to the complaint.

The answer was: first, general denial; third, that the cause of action did not accrue within three years; fourth, that the cause of action did not accrue within six years; fifth, set-off. The second paragraph has no importance, and need not be noticed. Issues were made upon the answer, and, upon trial, there was a finding and judgment for the plaintiff, as already stated.

There are some questions arising out of the evidence which demand our attention. *Pickett's* official term expired *September 7, 1857*, and on that day his successor assumed the duties of the office. This suit was commenced *August 26, 1863*, which was more than three, and but a few days less than six years after the cause of action accrued, for he could not fail to pay money to his successor until he had a successor, and then it became his duty to do so without a demand. The third paragraph of the answer was, there-

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fore, sustained by the evidence. Was that paragraph a good bar to the suit? Our statute of limitations, 2 G. & H., § 211, p. 158, requires such a suit upon an officer's official bond, against him, or against him and his sureties, to be brought within *three* years after the cause of action shall have accrued; but it also provides that an action may be brought against the officer *for money collected* in an official capacity and not paid over, at any time within six years. It would appear, therefore, that if this was a suit upon the bond, the bar was complete; but if it was a suit against the treasurer for "money collected in his official capacity and not paid over," then there was no bar shown by the third paragraph of the answer, nor by the evidence.

The legislature has certainly made a distinction, as to the period of limitation, between a suit against the officer upon his bond, and a suit against him for failing to pay over money collected by him as such, which failure would be a breach of the bond. The difficulty of discovering any sound reason for this distinction would not justify us in disregarding the plain enactment, that the suit upon the bond must fail unless brought within three years. By every mark that could distinguish the one from the other, this is shown by the complaint to be a suit upon the bond. Such is its form and substance. It alleges nothing but what was necessary to be alleged in such a suit; it alleges a breach of the bond as the cause of action, and though it does, as it necessarily must, aver facts which need to have been alleged in a suit for failing to pay over money collected as treasurer, yet it contains much which could only be proper in a suit upon the bond, and we cannot, therefore, hold it to be other than such a suit. Not having been brought within *three* years, as was pleaded and proved, the finding for the plaintiff cannot be maintained.

This disposes of all the questions which can properly be regarded as being in the record before us. Others are argued, which will doubtless arise in the further progress.

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of the cause, but we do not think it wise to volunteer opinions upon them in advance.

The judgment is reversed, and the cause remanded, with directions to the court below to set aside all its proceedings, as to the appellant, after his demurrer to the complaint, and to sustain the demurrer.

D. C. Chipman, W. Garver and E. S. Stone, for appellant.
D. Mass, for appellee.

MAXEDON v. THE STATE, on the relation of SIMPSON and Others.

In a proceeding for partition of real estate, a sale of the land was ordered, and A was appointed a commissioner, who, having given bond, and received part of the purchase money, absconded with the money. B was appointed his successor, and an action was brought on the land, in the name of the State, on the relation of B, and of C, guardian of D and others, who were not alleged to be minors, and who were part of the persons whose land had been sold. Demurrer on the ground that B had no legal capacity to act as relator, and that the persons whose land had been sold were the only proper relators.

Held, that B was not a proper relator.

Held, also, that C was not a proper relator, even though D and others were minors.

Held, also, that there being no averment that D and others were minors, they must be presumed to have been adults.

Held, also, that the suit should have been brought on the relation of the persons whose land had been sold.

Held, also, that the demurrer was sufficient to present the objection, under the code, that there was "a defect of parties plaintiff."

APPEAL from the *Madison* Common Pleas.

ELLIOTT, C. J.—This suit was first instituted in the name of the State of *Indiana*, on the relation of *Simpson*, who is described in the complaint as "a commissioner appointed by the Court of Common Pleas of *Orange* county, in the partition case of *Sarah Dixon* and others, in said court," on a bond executed by *Joseph Cox*, a former

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commissioner appointed by the court in the same partition suit, with *Mazedon*, the appellant, and one *Payne*, as his sureties. The object of the suit was to recover of the defendants an amount of money alleged to have been received by *Joseph Cox*, the former commissioner, being a part of the proceeds of the sale of certain real estate sold under the order of the court, in said proceedings for partition.

The court sustained a demurrer to the original complaint, for the reason that *Simpson* was not the proper relator. An amended complaint was then filed, on the relation of *Simpson*, as commissioner, &c., "and upon the relation of *John Dixon*, guardian of *Solomon Dixon*, *Deborah Dixon*, *Silas Dixon*, *Bedford Dixon* and *John Dixon*."

The complaint and proceedings in the case for partition referred to, are made a part of the amended complaint in this suit, by which it is shown that the real estate ordered to be sold, under the proceedings in that case, was owned in common by *Sarah Dixon*, the widow of *Silas Dixon*, deceased, and by *Solomon*, *Deborah*, *Silas*, *Bedford* and *John Dixon*, and that said *Sarah Dixon* was entitled to more than a moiety of the whole. It also appears by the complaint that *William Cox* was first appointed by the court a commissioner to sell the real estate; that he did sell the same, according to the terms of the order of the court, and that the sale was reported to, and confirmed by, the court, but that he died soon afterward, without having received any portion of the purchase money; that the court thereupon appointed said *Joseph Cox* his successor, who executed the bond in suit. And it is averred that *Joseph Cox* collected a large amount of the said purchase money, and left the country, without having, in any manner, accounted therefor; that he was removed by the court, and said *Simpson* appointed his successor.

Process was not served on the defendants, *Cox* or *Payne*, nor did either of them appear to the suit. The defendant, *Mazedon*, appeared, and moved to "strike the amended

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complaint from the files," but the court overruled the motion, and *Maxedon* thereupon demurred to the complaint for the following causes :

"1. That the complaint does not state facts sufficient to constitute a cause of action.

"2. That *A. J. Simpson*, one of the relators herein, has no legal capacity to act as relator.

"3. That the heirs of *Sarah Dixon*, and others mentioned as parties to the partition suit referred to in the complaint, are the only proper relators herein."

But the court overruled the demurrer, and this ruling presents the first question for our consideration.

The statute provides that, "every action must be prosecuted in the name of the real party in interest," except that an executor, administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute. 2 G. & H., §§ 3 and 4, pp. 35 and 36. Here, the real parties in interest are the persons who owned the land sold by the first commissioner, and who were entitled to the proceeds of the sale.

The bond sued on was not given on a contract made with *Simpson*, as commissioner, nor in his name. He had no interest in the money collected by *Joseph Cox*, the former commissioner, and secured by the bond. Nor do we conceive that it was at all requisite, in the discharge of the duties of his trust, whatever they may have been under his appointment, to sue for, or receive, the money that had come into the hands of *Cox*, a former commissioner.

The other relator, *Dixon*, occupies no better condition. The complaint does not aver that the persons of whom he

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represents himself as guardian of infants, and as, without such an averment, the law presumes them of age, the complaint is bad. *Shirley v. Hagar*, 3 Blackf. 225; *McGillucudy v. Forsythe*, 5 *id.* 435; *Hanly et al. v. Levin*, 5 Ohio Rep. 228.

If the suit was brought on the relation of the persons in interest, by *Dixon*, their guardian, without averring their infancy, his name might, perhaps, be stricken out as surplusage. But it is instituted on his relation, not on the relation of those he professes to represent, and the averment, therefore, can only be regarded as *descriptio personæ*.

But there is still another reason why the suit cannot be maintained in the name of *Dixon* as relator. The statute provides that, "when an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age." 2 G. & H., § 10, p. 42. And the next succeeding section enacts that, "before any process shall be issued in the name of an infant, who is a sole plaintiff, a competent and responsible person shall consent in writing to appear as the next friend of such infant," &c. From the various provisions of the statute referred to, it seems evident that the action must be brought in the name of the infant, by his next friend, and not by a guardian.

It should also be observed that, from the showing in the complaint, *Sarah Dixon* is entitled to a portion of the money sought to be recovered, and is, therefore, a party in interest, and should be made a party relator.

The demurrer, though not drawn in the language of the statute, we think should be considered as raising the objection "that there is a defect of parties plaintiffs," under the provisions of the code, and, for the reasons stated, should have been sustained.

Many other questions are discussed by counsel, some of which may possibly arise in a future trial or suit, but, in view of the imperfect manner in which they are presented

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by the confused record now before us, we do not feel called upon to examine them. When the proper parties are brought before the court, and the pleadings shorn of the redundant and irrelevant matter now presented, and proper averments made in a form to present the merits of the case, the questions referred to may not arise, but if they do, then will be the proper time for their decision.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer, with leave to both parties to amend their pleadings.

J. & T. S. Collins and Black & Wilson, for appellants.

McDonald & Roache, for appellees.

SKILLEN and Another v. CARLISLE.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—The appellants sued *Carlisle* for the possession of real estate, and to enjoin the proceedings in certain criminal cases, charging the forcible entry and detainer of the premises in controversy. A demurrer to the complaint was sustained in the court below, which presents the question for decision in this court. On the 6th of *September*, 1848, *James Blake* and *James M. Ray* platted part of out-block No. 148, in the city of *Indianapolis*, subdividing it into thirty-two lots, numbering from 1 to 32, and caused the plat to be recorded on that day. According to that plat, lots numbered 21 and 22 of the subdivision were bounded on the east and west by straight lines, and on the south by the *National Road*, running in a south-westerly direction from east to west. On the 2d of *February*, 1862, *Blake* and *Ray* made another plat of the same part of block No. 148, making, among other things,

the east and west lines of lots 21 and 22 run at right angles with the *National Road* for the distance back of thirty-two feet. This last named plat was acknowledged on the 30th of *June*, 1860, and recorded on the 20th of *August* following. On the 21st of *July*, 1855, *Blake* and wife, and *Ray*, conveyed by deed in fee to *Daniel Carlisle's heirs* lot 21, which deed was recorded on the 30th of the last named month. Under this deed, the appellants claim title by deed from one of *Daniel Carlisle's heirs*. On the 9th of *May*, 1860, *Ray* and wife conveyed by deed in fee, to the appellee, *John Carlisle*, lot 22. The dispute between the plaintiffs and defendant is about the boundary line dividing lots 21 and 22.

The complaint charges that the defendant is in the wrongful possession of a certain portion of lot 21, describing it, and that to recover the possession of the portion of lot 21 so described, the said *James Skillen* heretofore, on &c., brought his action in the *Marion* Circuit Court, against the defendant, alleging that the plaintiff was, on the 11th of *July*, 1860, seized and entitled to, and in the legal possession of, lot number 21, in out-block number 148, as laid off by *James Blake* and *James M. Ray*, in their addition to the city of *Indianapolis*, as per plat thereof, as recorded in the recorder's office of *Marion* county, and that afterward, in the month of *September*, 1860, the defendant unlawfully entered upon and took possession of some eighteen inches of the east side of said lot, and had unlawfully occupied the same until that time, and had unlawfully and without right kept the plaintiff out of the possession thereof, and demanding judgment for the possession thereof, and also \$500 in damages. That the defendant was duly served with a summons to appear in said court, to answer the said action; that he did appear by his counsel, and filed his answer to the complaint, denying every allegation thereof, and a jury being impaneled and sworn to try the issues joined, returned the following verdict, to-wit: "We, the jury, find for the plaintiff, and assess the damages at \$5,

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and we find that defendant does unlawfully occupy fifteen inches on the front of the east side of lot 21, mentioned in the complaint, running back seven and a half feet, to a point, belonging to the plaintiff." A judgment was rendered on this verdict, and the point made is, that on account of the conflicting plats, the verdict and judgment are inoperative, because of their uncertainty, and no bar to this action. It is shown by averments in the complaint, that the second plat was only matter of evidence on the trial of the prior suit. The deeds under which the respective parties claimed were also in evidence. By them it appears that the conveyances of lots 21 and 22, from *Blake* and *Ray*, were both made before the recording of the second plat, showing conclusively that the trial must have related to the description of these lots in the first plat. If there is any uncertainty in the description of the premises recovered in the former action, it must be sought for elsewhere than in the conflict between the two recorded plats. The description in the former suit is as certain as the description in the present action. It is not pretended that the court below could have enjoined the criminal proceedings, and the case in judgment must be regarded simply as an action for the recovery of the identical real estate recovered in the former suit.

We are of opinion that the Circuit Court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed, with costs.

RAY, J., was absent.

J. Morrison and *R. L. Walpole*, for appellants.

L. Barbour, J. D. Howland and *J. T. Jackson*, for appellee.

Westfall v. Stark.

WESTFALL v. STARK.

A mortgagee having filed a complaint against the mortgagor for foreclosure, and having purchased the mortgaged premises under the judgment, afterward filed his complaint against A and B, alleging the legal title to be in A, who had executed a title bond therefor to B, who had executed a title bond therefor to the mortgagor; that the purchase money had been paid to A, and that the plaintiff "was entitled to a conveyance in fee simple." The complaint also alleged that the plaintiff, when he received the mortgage, believed that the mortgagor had a good title, &c.

Held, that the plaintiff ought to have filed a copy of each of said title bonds with his complaint, but that the omission was cured by verdict, and that a motion in arrest of judgment would not lie.

Held, also, that the averment that the plaintiff was entitled to a conveyance of the land in fee simple, though defective, as alleging rather a conclusion of law than facts, was sufficient, after verdict, to support evidence from which such conclusion might have been drawn.

Reveal v. O'Conner, 21 Ind. 289, overruled.

APPEAL from the *Wayne* Circuit Court.

ABSTRACT.

The appellant was the plaintiff below. After a trial and finding for him in the Circuit Court, the judgment was arrested on motion of the appellee. The sustaining of this motion is the only error assigned.

The judgment was arrested for a supposed insufficiency of the complaint. The complaint is for a deed, and charges that in *June*, 1858, *Wilson Stark* and wife, who were made parties, conveyed the land to plaintiff by way of mortgage, to secure the payment of \$1,800, due plaintiff from *Stark*; that plaintiff accepted the mortgage in good faith, believing said *Stark* had a good title thereto; that at the *July* term, 1859, of the *Vigo* Court of Common Pleas, plaintiff foreclosed the mortgage; that an order of sale was issued on the decree, by virtue of which the sheriff, on the 7th day of *September*, 1859, sold and conveyed the land to plaintiff; that after the sale, plaintiff discovered that *Wilson Stark* held the land by a

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title bond executed to him by the defendant *Simpson Stark*; that the legal title was in *Jacob Ernest*, who was made defendant, and that *Ernest* had executed a title bond for the lands to *Simpson Stark*, who had paid to him the full purchase money, and *Wilson Stark* had paid *Simpson Stark* all, or nearly all, the purchase money. There was also an allegation, by way of amendment, that *Simpson Stark* had advanced the lands to *Wilson Stark*, who was his son, and put him in possession, and that he had made valuable improvements. The complaint was all in one paragraph, and the prayer was for a conveyance from *Ernest*.

There was no demurrer to the complaint, nor any motion to strike out or separate the complaint.

The answer was, first, a general denial; second, an argumentative denial, or matter amounting to such, to which there was a reply in denial. There was a third answer, which set up that the land had been conveyed to a third person since the commencement of the suit. This was held bad on demurrer.

RAY, J. — The appellee insists that the motion in arrest was properly sustained, because a copy of the title bonds from *Ernest* to *Simpson Stark*, and from *Simpson Stark* to *Wilson Stark*, were not filed with the complaint. These bonds, he insists, are, in part, the foundation of the suit. This position is, in our opinion, correct. The claim of appellant is that he is equitably invested with the title held by *Wilson Stark*, by virtue of the mortgage executed to him by said *Wilson*, and the foreclosure of the same, and sale and conveyance of the property to him by the sheriff. It would then rest upon the appellant to show, by averment in his complaint, that *Wilson Stark* was entitled to a deed from *Simpson Stark*, and that *Simpson Stark* was in a position to demand and enforce a conveyance from *Ernest*. If *Wilson Stark* were attempting to enforce a deed from his co-defendant, *Ernest*, by virtue of the title bonds from *Ernest* to *Simpson Stark*, and from *Simpson Stark* to him,

there can be no question that the title bonds would be the foundation of his action, and that copies of them should be filed with the complaint, or proper averments made excusing such copies, and showing that, by the terms of the bonds, he was entitled to enforce a deed from the obligors. The averments showing appellant to have equitably acquired the title of *Wilson Stark*, furnish no cause of action against the other defendants, and, as to them, his claim rests upon the promise to convey contained in the bonds. Those instruments, therefore, constitute the foundation of his action against those defendants. It has been heretofore held by this court, that advantage might be taken by demurrer, of the omission to file a copy of the written instrument which is the foundation of the action, and we have followed the ruling, although, had it been presented to us, as the court is now constituted, as an undecided question, we should have hesitated before holding that the defect could have been reached otherwise than by a motion to require the filing of the copy. It seemed, however, to present simply a question of practice, involving no substantial right, and having been long settled, we did not feel it our duty to disturb the decisions placing it at rest. When, however, we are called upon to follow up these decisions, and, upon the reasoning on which they rest, to hold that advantage may be taken of the defect, which is but matter of form, to arrest the judgment on motion, where the averments of the complaint are sufficient, although informal, to authorize the introduction of proof which would sustain the verdict, and where a verdict has been reached upon the merits, we cannot say that substantial rights are not involved in the decision. The averments in the complaint, in this case, are not formal, but they are sufficient to authorize the introduction of all the evidence necessary to support the verdict obtained for the plaintiff below. The averment that the appellee "is entitled to a conveyance of the fee thereof from said *Ernest*," although a conclusion of law, rather than an averment of facts, still authorized the

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introduction of the evidence to show the facts from which such a conclusion might be reached. The verdict will cure the defective averment. The rule is stated thus: "If the pleadings of the party for whom a verdict has been found are faulty, in omitting some particular fact or circumstance, without which he ought not to have judgment, *but which is, nevertheless, implied in, or inferrible from*, the findings of those facts which are expressly alleged and found, the pleading is aided, (because the omission is supplied,) by the verdict. In other words, the court, in such a case, must *presume* that the fact or circumstance omitted was *proved to the jury*." Gould's Plead., ch. 10, § 12.

LORD MANSFIELD, in the case of *Rushton v. Aspinall*, stated the rule to the following effect: "Where the *statement* of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all *circumstances* necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, and it is, therefore, a fair presumption that they were proved." In this view of the question, we regard the ruling of the court sustaining the motion in arrest of judgment as erroneous. This conclusion being in conflict with the ruling in the case of *Reveal v. Conner et al.*, 21 Ind. 289, that decision is overruled.

The judgment is reversed, and the cause remanded, with instructions to render judgment upon the verdict for the plaintiff. Costs against the appellee.

J. P. Baird, for appellant.

Smith & Mack, for appellee.

THE STATE v. HINEY and Others.

A complaint upon a forfeited recognizance alleged that A, the principal obligor, was under arrest, and in the custody of the sheriff, by virtue of a warrant directed to him by the clerk of the *Howard* Circuit Court, issued by the said clerk upon an information previously filed by the district attorney, charging that, in the county, &c., A unlawfully sold intoxicating liquor, and that the defendants entered into the recognizance, which was approved by the sheriff.

Held, that the complaint was good.

The complaint also alleged that the recognizance was defective in this, "that the subscribing was '*Joseph K. Hiney, Smith & St. Clair*,' and it should be *John St. Clair* and *Andrew J. Smith*, for that the said sureties did intend to bind themselves jointly and severally in the aforementioned sum." The copy of the recognizance filed showed that the instrument was signed "*Smith & St. Clair*."

Held, that the averment, though informal, was sufficient.

APPEAL from the *Howard* Circuit Court.

RAY, J.—Action upon a forfeited recognizance. Demurrer to the complaint sustained. The appellee insists that the complaint is defective in not showing authority in the officer to take the obligation. It is shown that the defendant *Smith* was under arrest, in the custody of the sheriff, by virtue of a warrant to him directed by the clerk of the *Howard* Circuit Court, issued by said clerk upon an information previously filed by the district attorney, charging that in the county, &c., he, *Smith*, unlawfully sold intoxicating liquor, and that the defendants entered into a recognizance, which was approved by the sheriff. The allegations are clearly sufficient. The complaint alleges "that said recognizance is defective in this, that the subscribing was '*Joseph K. Hiney, Smith & St. Clair*,' and it should be *John St. Clair* and *Andrew J. Smith*, for that the said sureties did intend to bind themselves, jointly and severally, in the aforementioned sum." The copy of the instrument filed shows that it was signed "*Smith & St. Clair*." The averment, though not formal, is

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sufficient. 2 R. S., § 790, p. 333. The demurrer should have been overruled.

The judgment is reversed, at the costs of appellees.

D. Williamson, Attorney General, for the State.

J. W. Robinson, for the appellees.

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THE BOARD OF COMMISSIONERS OF FRANKLIN COUNTY, on the relation of BENTLEY, Auditor, &c., v. McILVAIN.

A suit on behalf of a county must be brought in the name of the board of commissioners of the county, and a complaint in the name of the board of commissioners, on the relation of the county auditor, is bad, on a demurrer alleging that the plaintiff has not legal capacity to sue.

APPEAL from the *Franklin* Circuit Court.

RAY, J.—The defendant below, the appellee here, demurred, on the ground that the plaintiff had no legal capacity to sue, and that the facts stated did not constitute a cause of action. The statute provides that the commissioners of the county shall be “a body corporate and politic, by the name and style of ‘Board of Commissioners of the county of —,’ and as such, and in such name, may prosecute and defend suits,” &c. 1 G. & H. 248. The statute does not authorize the county to sue in any other form, nor does it empower the auditor to sue in the name of the county, or as such auditor, except in the name of the state, in regard to certain trust funds. The court properly sustained the demurrer.

To prevent future useless litigation, we will intimate, that where the board of county commissioners have authorized a bounty to be paid to volunteers, and have received credit from the government for a soldier furnished, and the county order has been delivered, a suit cannot be maintained to recover the order, because the soldier so accepted by the government, on

The State, on the relation of McNeal and Others, v. Bennett and Another.

behalf of the county, is not within the strict letter of the description of the persons to whom the bounty is offered, or because, at some future date, the soldier has been discharged by the government from the military service, while the county still retains credit for the volunteer furnished.

We will also add, as matter of information, that upon the sustaining of a demurrer to a complaint, the code of practice does not absolutely require that a bill of exceptions should be taken, embracing in its limits, in *hæc verba*, the entire complaint, with all the exhibits, the demurrer, the action of the court, the exception taken, and all the entries of the clerk of record in the cause.

The ruling of the court below has been passed upon by this court, in some instances, where the record has not been so voluminous.

The judgment is affirmed, at the costs of the relator.

H. C. Hanna, for appellant.

W. Morrow, W. H. Hay and *J. H. Farquhar*, for appellee.

THE STATE, on the relation of McNEAL and Others v. BENNETT and Another.

ADMINISTRATOR'S BOND — A suit may be maintained on the bond of an administrator, joint and several in its terms, against one or all of the obligors.

SAME. — The heirs-at law of an intestate may sue upon the bond of the administrator, to recover for assets converted by the administrator to his own use, and for which he has failed to account.

SAME. — **SUIT AGAINST A SURETY.** — In a suit against a surety on the bond of an administrator, the breach alleged in the complaint was that there had come to the hands of the administrator, assets of the value of, &c., which he had converted to his own use, and wholly failed to account for. *Held*, that the breach was sufficient.

The State, on the relation of McNeal and Others v. Bennett and Another.

CONSTITUTIONAL LAW.—CONTRACT.—The law in force at the commencement of the action governs the remedy, unless, in the case of a new remedy, its application would impair the obligation of the contract.

SAME.—The legislature, though it cannot impair the obligation of a contract, may give validity to one otherwise invalid.

APPEAL from the *Jennings* Common Pleas.

GREGORY, J.—Complaint on an administrator's bond, joint and several in its terms, on the relation of the heirs at law of one *Norman McNeal*, deceased. The bond was executed by one *Angus McNeal*, as the administrator of the estate of the said *Norman*, with one of the appellants, and three other persons, as his sureties. The suit is against *Samuel Bennett*, sen., an insane person, and his guardian. *Angus McNeal* died before the commencement of the action. The breach complained of is, that there came to the hands of *Angus McNeal*, as such administrator, assets of the value of \$1,000, which he converted to his own use, and wholly failed to account for.

Demurrer to the complaint, because it does not state facts sufficient, and because there is a defect of parties defendants, in this, that all the parties to the bond sued on should be made parties defendants. The demurrer was sustained, and this presents the only question for our consideration. There is no brief on the part of the appellee, and we are not informed of the ground of the action of the court below.

The bond is joint and several, and, at common law, the obligee might sue one or all of the makers. We do not think the statute changes the rule. 2 G. & H., § 20, p. 50.

The bond was executed in 1847, but the *remedy* must be sought under the law in force at the commencement of the action, unless the application of the new remedy to the contract would impair the obligation of the latter. The legislature, so far as the remedy is concerned, may validate, but cannot invalidate the obligation of a contract.

The heirs at law may maintain this action. 2 G. & H., § 163, p. 529.

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The breach assigned is sufficient. *The State v. Scott*, 12 Ind. 529.

The judgment is reversed, with costs, and the cause remanded to said court, with directions to overrule the demurrer to the complaint, and for further proceedings.

J. D. New and *C. E. Walker*, for appellant.

MILES v. LINGERMAN.

GENERAL ISSUE—PROOF UNDER, IN REAL ACTION.—A complaint for the possession of real estate alleged that the plaintiff was the owner and entitled to the possession of the land, and was kept out of possession thereof by the defendant. Answer, a general denial.

Held, that under the issue, the plaintiff might prove that he executed a conveyance of the land during infancy, and disaffirmed it on attaining to full age.

INFANT—DISAFFIRMANCE OF DEED BY.—One who has disaffirmed a conveyance made during infancy is not required to tender back the purchase money to support an action to recover possession of the land.

SAME.—The circumstance that land conveyed by an infant has subsequently been sold by the grantee, to a person who did not know of the disability, will not, of itself, prevent the minor from afterward disaffirming the conveyance.

SAME.—To estop the minor from disaffirming the conveyance, on arriving at full age, some act must have been done, or there must have been some omission, after reaching majority, which would work injury to the person in possession under color of title, rendering the disaffirmance a fraud upon him.

MARRIED WOMAN—DISAFFIRMANCE OF DEED EXECUTED BY, DURING COVERTURE AND MINORITY.—Though under our present statute, a married woman may disaffirm a conveyance made by her during minority, and bring an action to recover the lands, without the assent, and even against the will of the husband, yet she will not be estopped from avoiding the conveyance merely by an omission, for any length of time, during her coverture, to disaffirm it, unconnected with any other circumstances.

SAME.—An infant, being a *feme covert*, joined with her husband in the conveyance of her land to A, who, subsequently, without her knowledge conveyed it to B. Near ten years after attaining to full age, being still *covert*, she gave notice to B of her intention to avoid the deed, and

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commenced an action to recover possession of the land. Some slight improvements had been made upon it after she conveyed it, of which, however, she knew nothing. She had resided within four miles of the land for two years after she arrived at full age, and within ten miles of it up to the time of trial.

Held, that she was not estopped by these circumstances from asserting title to the land.

APPEAL from the *Hendricks* Circuit Court.

RAY, J.—This action was brought by *Paulina Lingerman*, to recover the possession of certain real estate. The averments are her ownership in fee simple, and that she has been kept out of possession wrongfully. The appellant answers, denying the averments.

The proof was that the plaintiff, being the owner of the real estate described in the complaint, joined with her husband, about seven months before she came to her majority, in the execution of a conveyance of the land to the *Indiana & Illinois Central Railway Company*. At the time of signing the instrument, she notified the agent of the company that she could not execute the deed, by reason of her minority. The property was subsequently conveyed by the company to the defendant. Evidence was also introduced, on the trial, that the plaintiff had given notice to the defendant of her intention to avoid the deed.

The evidence of the minority of the plaintiff, at the time of the execution of the conveyance, was introduced over the objection of the defendant. The objection urged is that the evidence is outside of any issue tendered by the complaint.

It is also insisted that the action cannot be maintained, because there had been no tender of the consideration received by the plaintiff at the time of signing the deed to the company. Each of these objections arises from a misapprehension of the purpose of this suit. The action is not to avoid the deed executed to the railroad company, for that had already been done by the notice she had given to the defendant. The suit was simply to obtain

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possession of real estate, of which she averred she was the owner, and damages for its detention. The issue of ownership certainly authorized the proof that when she executed the deed to the railroad company she was a minor, and that she had, since reaching her majority, declared her will to avoid the conveyance. This is proof of a fact which had already transpired, and a single link in her chain of title, and necessary evidence to support her averment of ownership. But the complaint contains all the allegations required by the statute in this action, and, under these allegations, all proof required to establish title is relevant to the issue formed by a denial of the complaint.

The exception reserved upon the failure to prove an offer to return the purchase money is not well taken. Where the plaintiff is in the possession of the property, and comes into a court of equity, asking to have some cloud removed from her title, she must restore any consideration received from the defendant; she must do equity. But when, having by her own act avoided the deed, she comes into a court of law, demanding possession of property to which she holds a perfect title, no equitable conditions can be imposed upon her by the court. She comes, not invoking the aid of the court to remove a cloud from her title, but demanding possession of property, the title to which she has, by her own act, rendered perfect, without assistance from the equitable power of the court. *Pitcher et al. v. Laycock et al.*, 7 Ind. 398.

It is insisted, however, that the deed of an infant cannot be avoided in the hands of a subsequent grantee, who purchased without notice of the minority of the person executing the conveyance to his grantor. This position can only be sustained upon the doctrine of estoppel, for the grantor can convey no better title than he holds, and some act must be done, or there must be some omission, by the minor, after reaching majority, resulting in an injury which would render the avoidance of the conveyance a fraud upon the person in possession under color of title.

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The appellant also insists that this suit cannot be maintained, because not commenced until after the lapse of ten years from the time the appellee arrived at full age. There was no proof on the trial of an actual affirmance of the deed executed during infancy, after the appellee reached majority. There was proof, however, that, at the time of her conveyance, she was a married woman, and that she continued under such statutory disability at the time of the trial. 2 G. & H., § 215, p. 161; *id.*, p. 335, art. 48; *Doe v. Abernathy*, 7 Blackf. 442. Under our present statute, the wife may bring her action in regard to her own estate as though she were a *feme sole*; still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although, as to her power to disaffirm her contracts made during minority, her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action, without the assent, and even against the will, of her husband. But the legislature has not required her to exercise that power during coverture. It might result, indeed, that the exercise of that power, without the consent of the husband, would impair the harmony of the marriage relation. The law, therefore, having empowered the wife to act, is still careful not to require such action as might, perhaps, imperil her domestic peace, in the effort to secure her property. We do not decide that there may not be circumstances under which, having the legal power to act, the neglect to do so would amount to a fraud upon third parties, and prevent any after disaffirmance of her conveyance. Nor do we decide that even her failure to act, under such circumstances, would be an affirmance of the deed, and pass from her a title, which our statute declares can only be divested by a conveyance in which her husband has united. The evidence does not require us to decide this question, and it may be that no evidence in this case could present the point for our consideration, but the husband, having united with his wife in the deed while she

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was a minor, would be held to be estopped from asserting a right to dissent from her affirmance of the instrument after she reached her majority.

There was proof that the railroad company, to whom the appellee conveyed the land in question, had notice both of the minority and marriage of the grantor, and that she then agreed to re-acknowledge the deed upon the completion of the road; that the road was still unfinished; that she never knew of any contract or offer of sale by the company, nor was she aware of the conveyance, or of even the slight improvements having been placed upon the property, until she gave notice of her intention to avoid the deed, and the suit was brought within a few months after that time. The land was unimproved when conveyed. We hold that, under these circumstances, she is not precluded from asserting her title to the land, although she resided within four miles of the property for two years after she arrived at full age, and within ten miles thereof up to the time of the trial.

The judgment is affirmed, with costs.

C. C. Nave and *B. K. Elliott*, for appellant.

P. S. Kennedy, for appellee.

 CUPPY v. THE STATE, on the relation of GRANTHAM.

BASTARDY.—A married woman may, under the R. S. 1852, prosecute an action for bastardy.

SAME.—WITNESS.—The testimony of a married woman is admissible in the action, to prove non-access by the husband, and that the child, though begotten and born during the marriage, is a bastard.

APPEAL from the *Sullivan* Circuit Court.

RAY, J.—Prosecution for bastardy. The relatrix was a married woman, residing with her husband. She was permitted, over the objection of the defendant, to prove

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165	374
165	375

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non-access by the husband; that he had been in the army for more than a year preceding the birth of the child. Our statutes, prior to 1843, provided that such proceedings might be instituted by any "unmarried woman." Under such a statute, it was held that a prosecution could not be sustained on the relation of a married woman. *Smith v. The State*, 4 Blackf. 188. The statute was changed in 1843, so as to read, "when any woman," &c., and the same language is used in the present act. Whatever opinion may be entertained by this court upon the policy of the change, we cannot, by judicial construction, avoid it. The legislature has clearly the power to authorize the proceedings upon the relation of "any woman," and, having done so, we have only to sustain its action, and enforce the law as it now exists. At common law, a married woman was not a competent witness to prove non-access by the husband, but our statute has declared "that the mother of the child, if of sound mind, shall be a competent witness." 2 G. & H., § 3, p. 625. A witness declared competent by statute is to be regarded as any other witness, and restrictions imposed by the common law cannot be applied as restricting her testimony, in the face of the express letter of the statute.

There was no error in overruling the objection of the defendant to the admission of the evidence of the relatrix.

The defendant requested the court to give the following instruction:

"It is against the policy of the law, and in contravention of the marital relations, to permit either the husband, or the wife, to testify that a child begotten and born during the existence of the marriage, and whilst they were living together, is a bastard."

The court could not declare the policy of the law to be in conflict with its express declaration, and, therefore, properly refused the instruction asked.

The judgment is affirmed, with costs.

J. M. Hanna, for appellant.

CITY OF INDIANAPOLIS v. STURDEVANT.

BOARD OF EQUALIZATION.—The board of equalization of a city has no power to determine whether property assessed is taxable or not.

SAME.—*Seem* that its power extends only to equalizing valuations made by the assessors.

CONSTITUTIONAL LAW.—EDUCATION.—The intention of section 1 of article 10 of the constitution of 1851, was to leave the legislature at liberty to encourage the establishment of institutions of learning, by exempting them from the usual burden of taxation, whether the enterprise might be undertaken on public or private account.

SAME.—This immunity to the founders of such institutions is not in conflict with the twenty-third section of the bill of rights.

TAXATION.—EXEMPTION FROM.—A building was erected upon a lot in *Indianapolis*, for the use of a literary and scientific institution, and the premises were kept and appropriated for that use, a corps of teachers being employed in instructing large numbers of pupils in ancient and modern languages, in the various sciences, and in the branches of education usually taught in colleges. The institution was conducted on private account, and the earnings were applied to the individual benefit of the proprietor.

Held, that under the act of 1861, the proprietor was exempt from taxation.

SAME.—By the term "institution," as employed in said act, is meant a permanent establishment, in contradistinction to an enterprise of a temporary character.

APPEAL from the *Marion* Circuit Court.

FRAZER, J.—This was a suit by *Sturdevant* to recover \$81 90, paid as city taxes, under protest, to prevent the sale by the treasurer of the property upon which the taxes were assessed. The property taxed is generally known as "*McLean's* Female Institute," a plat of ground in *Indianapolis*, less than an acre in extent, with the buildings thereon, which were erected for the use of a scientific and literary institution. *McLean*, the original proprietor, for ten years used the premises for that purpose, until his death, which occurred in 1861, instructing young ladies in the ancient and modern languages, in the various sciences, and in all the branches of education usually taught in colleges, and was assisted by a corps of competent teachers. Since *McLean's* death, *Sturdevant*, who became the owner of the property, has devoted it solely to the same use.

24	391
151	355

24	391
155	641

City of Indianapolis v. Sturdevant.

The complaint, alleging substantially the foregoing facts, was met below by a demurrer for the want of sufficient facts to constitute a cause of action, and for lack of jurisdiction in the Circuit Court, which was overruled, and the questions thus made are before us.

An answer was also filed, alleging that for board and tuition of pupils in the school, a price was charged against each pupil, and received by the plaintiff for his own benefit, and that from his business, thus conducted, he derived large profits, which he appropriated to his own use. To this a demurrer was sustained, and the question raised thereon is also presented here.

The jurisdiction of the Circuit Court is questioned, because the city charter provides for a board of equalization to hear and decide all complaints in reference to the assessment roll, and it is suggested that the original jurisdiction over the question is exclusively in that board, and that the plaintiff is concluded by having failed to make application for relief before that tribunal.

We cannot concur in this proposition. The power of the board of equalization seems to extend only to equalizing valuations made by the assessor, and no authority is given to determine whether or not property assessed is taxable. 1 G. & H., § 44, p. 228.

Article 10, section 1, of the constitution, provides for a uniform and equal taxation on all property, "excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

In 1861, the legislature enacted that the following property should be exempt from taxation :

"Every building erected for the use of any literary, benevolent, charitable, or scientific institution, *by any individual or individuals, association or corporation*, or erected for the same purpose by any town, township, or county, and the tract of land on which such building is situated, not exceeding twenty acres ; also, the personal property belong-

ing to any institution, town, township, city or county, and connected with, or set apart for, any of the purposes aforesaid." Acts 1861, p. 170.

The education of the people is an object of the very greatest consequence in a government like ours. It is absolutely essential to its existence; and this has been received as an axiom by all enlightened statesmen, at every period since we have been a nation. It largely pervades the constitution of the State, and its accomplishment has uniformly been a leading and cherished purpose of our legislation. The evident intention of the clause of the constitution above quoted, was to leave the legislature at liberty to encourage the establishment of institutions of learning, by exempting them from the usual burden of taxation, whether the enterprise might be undertaken on public or private account. The language is as comprehensive as it is possible to make it. Nor would such immunity to all individuals founding such institutions in any respect contravene the twenty-third section of the bill of rights, for all individuals would be at liberty, upon the same terms, to claim the exemption.

It remains, then, only to consider whether the legislature has, by that portion of the act of 1861 above copied, used language which will exempt the plaintiff's property from taxation.

The appellant insists that the act cannot have that effect, for the reason that the seminary in question is not a *literary* or *scientific* institution, and *Indianapolis v. McLean*, 8 Ind. 328, is relied upon as an authority directly in point. We do not so regard it; but if it were so, we should probably feel it to be our duty to re-examine the reasoning of that case. But we do not perceive that that case in any degree touches the question now under consideration. The question there was whether the evidence was sufficient to support the finding, and it was held that it was not, because it did not show that the school was a literary or scientific institution. But in the case now in hand, the

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questions are all raised upon the pleadings, by demurrer, and the facts as alleged must be regarded as true. The complaint expressly avers that the buildings were erected "for the use of a literary and scientific institution," and that the premises have ever since been "kept and appropriated for the use of a literary and scientific institution," in which a corps of teachers have been engaged in teaching large numbers of pupils, "in ancient and modern languages, in the various sciences, and in all the branches of education usually taught in colleges." These averments can leave no question that the establishment is a literary and scientific institution, and consequently within the express letter of the statute. It follows that the demurrer to the complaint was correctly overruled.

The answer introduces into the case the additional fact that the institution was conducted on private account, and the earnings of it applied to the personal benefit of the individual proprietor. We have in part anticipated the question thus presented, by announcing the opinion that the constitution confers power upon the legislature to exempt from taxation the property of an individual which is devoted to educational, literary and scientific purposes. Has the legislature exercised this power? The act of 1861 amends the act of 1852 by introducing the words in italics. If there was doubt before, it seems to us that there can be none since the act of 1861. We are unable to conceive of any object which could be attained by the amendment, but to make the matter perfectly clear. "Every building erected for the use of any literary or scientific institution, *by any individual or individuals, association or corporation,*" is exempted from taxation. It would be difficult to employ language which would more clearly cover the case before us.

Nor does it seem to us that it will result, as is apprehended by counsel, that every private school room, or building containing such a school room, would be exempt from taxation. To obtain that immunity, it must have

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been "erected for the use of a literary or scientific institution." This implies more than the application of the property for the time being, merely, to educational uses. By the term "institution" is understood a permanent establishment, as contradistinguished from an enterprise of a temporary character. The statute could not be held to comprehend the latter, for it would be in no just sense an institution.

The judgment is affirmed, with costs.

B. K. Elliott, for appellant.

D. McDonald and *A. G. Porter*, for appellee.

KEEN and Others v. PRESTON and Others.

24	300
130	315
150	540

SALE TO PAY DEBTS.—A sale absolute in its terms, for the satisfaction of a debt, is not void under the act concerning voluntary assignments, (1 G. & H. 114,) merely because an excess in value of the property, over the amount of the debt, was to be returned to the debtor.

VOLUNTARY ASSIGNMENTS.—The act concerning voluntary assignments (1 G. & H. 114,) does not apply to a transfer of property made by a debtor not in embarrassed or failing circumstances.

CONTRACTS, WHETHER ENTIRE OR DIVISIBLE.—Whether a sale of chattels in part satisfaction of a debt, and a transfer of notes, at the same time, as collateral security for the same debt, constitute separate transactions, or but one, is a question for the jury.

SAME.—Though the sale of the chattels and the transfer of the notes were in execution of one agreement, the transactions were nevertheless separable, and, hence, if the transfer of the notes was fraudulent, it could not contaminate the sale, if *bona fide*, of the chattels.

SALE.—JURY.—Whether a sale is honest, or not, is a question for the jury.

SALE ON EXECUTION.—INSUFFICIENT NOTICE.—A sale of personal property on execution, to the execution creditor, on a notice of but nine days of the time and place of sale, is void.

SALE.—EXECUTION.—A sold to B a certain number of staves, and having delivered part, failed to deliver the rest.

Held, that those delivered were not, on account of the non-delivery of the rest, subject to execution as the property of A.

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APPEAL from the *Vanderburgh* Common Pleas.

FRAZER, J.—This was replevin to recover a quantity of staves. Two defenses were pleaded. 1. General denial. 2. Property in the defendants. There was a jury trial, a verdict for the defendants, and a judgment thereon over a motion for a new trial. The plaintiffs appeal.

The evidence is in the record, and discloses that one *Hawkins*, a retail merchant, being indebted to the plaintiffs in about the sum of \$2,800, on the 27th of *January*, 1861, executed to them an absolute bill of sale of his stock of store goods, and the staves in question. Immediate possession was taken of the goods by the plaintiffs. The quantity of staves was not definitely known, but was estimated in the invoice at forty thousand, "more or less," and the price was to be \$7 per thousand. Before the 1st of *June*, the staves in question, being 22,359, and only a part of those invoiced, were counted, piled, and taken possession of by the plaintiffs. The balance of the staves never were delivered, and some of them were not fully manufactured when the bill of sale was executed. The goods and forty thousand staves amounted to \$1255 23. *Hawkins* also delivered to the plaintiffs, at or about the same time, as collateral security, notes and accounts amounting to about \$2,000. He had other property remaining, which considerably exceeded in value all his other indebtedness. The defendants, in *April* of the same year, obtained a judgment against *Hawkins* for his entire indebtedness to them, \$239 86, upon which execution issued on the 1st of *July* following. It was levied on the staves in controversy, and, upon nine days' notice thereof, the defendants became the purchasers of the staves at sheriff's sale, with full knowledge that the plaintiffs claimed to own them, and were in possession of them. After the sale by the sheriff, the defendants took possession, and shipped them from *Sullivan* county to *Evansville*, and there this suit was brought. The plaintiffs always admitted that the collaterals would pay the residue of their claim, and leave a balance for

Hawkins, and indeed they returned a portion thereof to him. They were his largest creditors; he owed them more than all others. The defendants contended below that the transaction between *Hawkins* and the plaintiffs was an assignment for the benefit of creditors, and, therefore, void under the act concerning voluntary assignments, (1 G. & H. 114,) and the court refused several instructions to the jury, asked by the plaintiffs, laying down the law to be that if any surplus was to be returned to *Hawkins*, or applied on his other debts, that fact would not make void, under that act, what was otherwise an absolute sale. This was error. We had occasion to consider one aspect of this question in *Wilcoxon v. Annesley*, 28 Ind. 285. But in the case now before us, there was not sufficient evidence that *Hawkins* was in embarrassed or failing circumstances; and without that element in the case, the act concerning voluntary assignments could have no application to it whatever. Other instructions given assume the law to be the exact contrary of what was thus asked by the plaintiffs. That they were erroneous is so clear that the appellees do not attempt to sustain them in argument here.

Whether the sale of the personal property and the transfer of the collaterals were parts of the same transaction, or separate transactions, was, if a question at all, for the jury to decide upon the evidence. The court, however, took that question from the jury, by instructions which assumed that the whole constituted one transaction, and thus mingling them, assumed the law to be that if either was void, the whole was void. This was also error. The two things, even if both were done in execution of one agreement, were nevertheless separable, and a fraudulent transfer of the collaterals could not contaminate a *bona fide* sale of personal property; and whether such sale was an honest transaction was a question for the jury, which the court also improperly withdrew from their consideration. The evidence was of such a character that this question arose upon it, inasmuch as there was some

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evidence tending to show that the whole arrangement was designed by both parties to delay other creditors.

The following instruction, asked by the plaintiffs, was refused:

"If the jury believe, from the testimony, that the staves in controversy were purchased by the defendants at sheriff's sale, after only nine days' notice of said sale had been given by the sheriff, then they are chargeable with notice of such fact, and such sale could confer no title on the defendants." Surely this ought to have been given. The purchasers were plaintiffs in the execution, and chargeable with notice of the irregularity. This is a familiar doctrine of the law, and it was applicable to the case as made by the evidence.

Of the whole quantity of staves included in the bill of sale, only those in controversy had ever been delivered by *Hawkins* to the plaintiffs. We suppose it to be very clear that a failure to deliver a part could, alone, constitute no sufficient legal objection to the plaintiff's title to those which had been delivered. But as we understand the third instruction given to the jury at the request of the defendants, it means that if forty thousand staves were not delivered by *Hawkins* to the plaintiffs, then those in controversy, though as to them no act remained to be done by either party to put the plaintiffs in possession of them, would not, in law, be deemed delivered, and were, therefore, the property of *Hawkins*. We think that this did not express the law. *Moffatt v. Green*, 9 Ind. 198.

The appellees insist that the verdict and judgment below were so clearly right upon the evidence, that there ought to be an affirmance, notwithstanding the errors already mentioned. This is the second time this case has appeared here, (18 Ind. 67,) and as the amount in controversy is not large, we should be reluctant to protract the litigation. We have accordingly examined the evidence with care, and, without embarrassing either party by expressing any opinion as to its preponderance, we perceive that it is not of a character to justify an affirmance as urged. It is

TEAGARDEN v. Garver and Another.

contradictory upon vital points, and necessarily involves the veracity of witnesses in its determination.

The judgment is reversed, with costs, and the cause remanded for a new trial.

C. Baker and C. E. Marsh, for appellants.

J. E. Blythe and M. S. Johnson, for appellees.

TEAGARDEN v. GARVER and Another.

APPEAL.—REVENUE STAMPS.—A motion was made in the Court of Common Pleas to dismiss an appeal from a justice of the peace, because neither the certificate of the justice, nor the appeal bond, was stamped with the appropriate revenue stamp. Leave was granted to attach the stamps, the justice canceling the stamp upon his certificate, and one of the obligors that upon the bond. The motion to dismiss the appeal was afterward sustained.

Held, that if the want of proper stamps rendered the certificate and bond insufficient, the appellant had a right, under the statute, to have the certificate amended, and to file a sufficient bond.

Held, also, that as the alleged defect in the certificate and bond was cured by attaching the proper stamps, it was error to dismiss the appeal.

Held, also, that while the statute requires, in such case, that a bond shall be filed "to the acceptance of the court," it is error to refuse a bond, if there is no valid objection to it.

Held, also, that the cancellation by one of the obligors of the stamp attached to the bond was sufficient.

APPEAL from the *Fountain* Common Pleas.

ELLIOTT, C. J.—Suit before a justice of the peace. The appellant appealed to the Court of Common Pleas, and filed an appeal bond in due time, which the justice approved.

In the Common Pleas, the appellees moved to dismiss the appeal, because neither the appeal bond nor the justice's certificate to the transcript was stamped with a *United States* revenue stamp. By permission of the court, proper stamps were attached to the appeal bond and justice's cer-

Teagarden v. Garver and Another.

tificate, and were canceled, the one by the appellant, and the other by the justice of the peace. But the court afterward, over the defendant's objection, dismissed the appeal.

This, we think, was an error. We do not now determine whether, under the act of Congress, stamps were required to these papers, nor the still more important question as to the power of Congress to declare void the writs, &c., pertaining to suits brought in the courts of this state, for the want of such stamps. The latter question is now pending in this court in several cases in which its decision may be necessary. A proper disposition of this case, however, does not require that we should pass upon either.

The statute regulating appeals from justices of the peace requires the justice, on the filing of a proper appeal bond, to make out and certify a complete transcript of all the proceedings had before him, and transmit the same to the proper court, &c., and provides that no such appeal shall be dismissed for a failure of the justice to transmit a proper transcript within the time required by the statute, "nor for the insufficiency of the bond, if the appellant will file a sufficient bond to the acceptance of the court" to which the cause is appealed.

It was the duty of the justice to certify up a proper transcript, and if his certificate was insufficient for any cause, it was the right of the appellant to have it amended. The objection to it was the want of a stamp, and the justice amended it by affixing the stamp and canceling it, and if the want of a stamp rendered it defective, the defect was cured by attaching it. And so with the appeal bond. It was a bond; the justice had approved it as such, and granted the appeal. If the want of a stamp rendered it void, then it was not a sufficient bond; but the appellant had the right to file a sufficient one, which he did by attaching the stamp to the old one, and making it sufficient. True, the statute requires that it must be to the acceptance of the court, but if no valid objection existed to it when stamped, and

Strawser v. Miller.—Hamlin v. Hanger.

the stamp canceled, it was error in the court to refuse to accept it, and dismiss the appeal. The appeal bond was executed by two obligors, and the stamp was attached and canceled by only one of them, which, we think, was sufficient. The object of the act of Congress is to raise revenue, and the stamps are required to be canceled to prevent their use a second time. This was fully accomplished by one of the obligors canceling it, as required by the act of Congress.

The judgment below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Tipton and Davidson, for appellant.

STRAWSER v. MILLER.

APPEAL from the *Fountain* Common Pleas.

GREGORY, J.—This case involves the same questions ruled upon by this court in the case of *Teagarden v. Garver et al.*, ante, p. 399, and, for the reasons stated in that case, the judgment of the court below must be reversed.

The judgment is reversed, with costs, and the cause remanded to said court, with directions to overrule the motion to dismiss the appeal, and for further proceedings.

Tipton and Davidson, for appellant.

Milford and Milford, for appellee.

HAMLIN v. HANGER.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—This case was commenced before a justice of the peace, and appealed to the Court of Common Pleas,
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Knight, Adm'r of McKachan, v. The Toledo and Wabash Railway Co.

where a motion to dismiss the appeal for want of a sufficient appeal bond was sustained. The only objection made to the appeal bond was that it had not been stamped, as required by the revenue law of the *United States*. The appellant offered to affix the stamp on the bond in the court below at the time the motion was made, but the court refused to allow it to be done. This was error, for the reason given in the case of *Teagarden v. Garver et al.*, ante, p. 399.

The judgment is reversed, with costs, and the cause remanded to said court, with directions to overrule the motion to dismiss the appeal, on the appellant affixing a revenue stamp on the appeal bond, and for further proceedings.

C. Hamlin, for appellant.

J. T. Dye and A. C. Harris, for appellee.

KNIGHT, Administrator of MCKACHAN, v. THE TOLEDO AND
WABASH RAILWAY COMPANY.

RAILROADS.—INJURY TO ANIMALS.—The owner of a blind horse turned him out upon the common of a town, through which a railroad ran, where he was killed by a passing train. The injury did not occur on any street or alley, and the track was not fenced.

Held, that the owner was guilty of gross negligence, amounting to a willingness to suffer the injury complained of, and hence he cannot recover.

APPEAL from the *Wabash* Circuit Court.

GREGORY, J.—Suit to recover the value of a horse killed on the track of the defendant's railway, where the same was not fenced. The horse was killed in the corporate limits of the town of *Wabash*, but not on one of its streets or alleys. The court below, on a special finding and conclusion of law thereon, determined that a railway company was not bound to fence its track within the corporate limits of

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a town or city; but on this question, as it is one of importance, and is not necessary for the determination of the case in judgment, we give no opinion. We think the judgment of the court below was right on another ground. The record shows that *McKachan*, being cognizant of all the facts, turned a blind horse out on the common, near the track of the appellee's road, along which trains were passing every few hours, and where the horse was liable to wander on the track at any time, without the ordinary power of avoiding the danger of an approaching train. Under such circumstances, we do not think the party injured can be heard to complain in a court of justice; it would be a violation of one of the maxims of the law. We are aware of the previous rulings of this court, in which it seems to be held that for the killing of stock on an unfenced railway track, a recovery may be had, without regard to the question of diligence on the part of the owner, as well as on the part of the servants of the company. This decision is not in conflict with those rulings, and we shall not now examine their correctness. We think the case at bar one of gross negligence on the part of the owner of the horse, amounting to a willingness to suffer the injury complained of.

The judgment of the court below is affirmed, with costs.

J. U. Pettit, for appellant.

W. Z. Stewart, for appellee.

THE UNITED STATES EXPRESS COMPANY v. RUSH and Others.

24 403
164 363

COMMON CARRIERS.—A delivered to the *United States Express Company* a package of money, to be transported to a point not on the route of that company. The package was transported by the company to the point on its line nearest to the place of destination, and there delivered, as was customary, to the proprietors of a line of stages, known as "*Winslow's*

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Express," to be carried to its destination. The receipt given by the *United States Express Company* stipulated that the company undertook to forward the package to the point nearest to its destination reached by that company, and that the company should be held liable as forwarders only. The package was lost while in the custody of *Winslow's Express*. Suit by the consignees against the *United States Express Company* to recover the value of the package.

Held, that an express company may become liable as a common carrier, though it has not complied with the requirements of section 2 of the "Act declaring express companies to be common carriers." (1 G. & H. 827.)

Held, also, that the *United States Express Company* was only bound to transport the package safely to the point on its line nearest to the place of destination, and there deliver it to the proper carrier, to be forwarded to its destination, and having done this, that company was not responsible for its subsequent loss.

APPEAL from the *Delaware Circuit Court*.

RAY, J.—This action was brought by the appellees to charge the appellant, as a common carrier, for the loss of a package of money, for which the following receipt had been given:

*"United States Express Company,
Chesterfield, Ind., Sept. 19, 1864.*

"Received of *Pittsford & Makepeace*, one package, said to contain money, valued at fourteen hundred and forty-three dollars and 40-100, marked *Reese, Rush & Co., Fairmont, Ind.*, which we undertake to forward to the nearest point of destination reached by this company, perils of navigation excepted. * * * And it is expressly agreed that the *United States Express Company* are not to be held liable for any loss or damage, except as forwarders only.

For the proprietors,

[Signed,]

The appellant is alleged to have been engaged in transporting packages, money, bank bills, goods and merchandise, to and from points along the line of the *Bellefontaine Railroad*, for hire. The nearest point on the line of

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said railroad, having communication by any express with *Fairmont*, is *Anderson*. The package, it is averred, was never delivered to the appellees.

The answer alleged that the package was marked, "per express, *Reese, Rush & Co., Fairmont, Ind.*," and that the appellant delivered the same, at *Anderson*, to "*The Winslows*," who were driving coaches from *Anderson* to *Marion*, upon which route *Fairmont* is situated, to be by them delivered to said appellees. The line was styled "*Winslow's Express*," and conveyed packages of money and other articles, delivering them along the line of travel for hire. That the appellees had previously received a package over the same line, from the same parties, and were in the habit of sending packages by "*Winslow's Express*" to the office of appellant at *Anderson*. Said express carried and delivered all express packages which reached the appellant's office at *Anderson*, for points upon and beyond the line of said "*Winslow's Express*" route.

The reply alleges that the "*Winslow Express*" was a carrier for hire, "and that it was accustomed to receive from said express company, at said town of *Anderson*, packages, goods, money and bank bills, and to deliver the same at the several points on said line, one of which was the said town of *Fairmont*; that the "*Winslow Express*" had no other connection with the appellant. A demurrer was filed to the reply, and upon the court overruling the demurrer, the appellant suffered judgment to go on the pleadings.

It is evident, from the pleadings, that the parties to this suit desire to present fairly for our consideration, the question whether an express company, under its liability as a common carrier, having received a package for transportation which is addressed to a point beyond the line of the company receiving the same, is authorized, by custom of which the consignor has knowledge, to deliver the same to another express company, having the same liability as a common carrier, and reaching along its

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route, the point named as the destination of the package.

It is insisted, however, by the appellees, in argument, that the *Winslows*, though engaged in the transportation of money and merchandise for hire, were still not an express company, although they so styled themselves, because they had not complied with the requirements of the second section of the "Act declaring express companies common carriers, and providing for the safety of articles intrusted to their care." The act, however, simply defines who are common carriers, and if the argument be correct, then no one can become a common carrier until he complies with the requirements of the law; the penalty declared against all who act as common carriers without such compliance can never by any possibility be incurred. We will not, by a construction so unreasonable in itself, render the provisions of the statute of none effect. The reply would remove all doubt, if any existed after the averments in the answer, that the *Winslows* were, by law, common carriers. *Russell v. Livingston*, 19 Barb. 846; *Sherman v. Wells*, 28 Barb 403; *Newstadt v. Adams*, 5 Duer 43.

We might, perhaps, rest the decision of this case upon the indorsement upon the package, "per express, *Reese, Rush & Co., Fairmont, Ind.*," and hold the same to be a direction to forward by the connecting line of express to its destination.

Without resting the case upon this construction, however, we will proceed to determine the duty of the carrier in the disposal of the package, and his responsibility for the safe delivery of the same. It must now be regarded as clearly settled upon authority, as well as principle, in this country, that express companies are subjected to all the responsibilities of common carriers of goods. The authorities are numerous. We cite the following. *The Mercantile, &c., Ins. Co. v. Chase*, 1 E. D. Smith 115; *Sherman v. Wells*, 28 Barb. 403; *Baldwin v. American Express Company*, 23 Ill. 197; 26 *id.* 504; *Lowell Wire Fence Company v. Sargent*, 6 Allen 189.

The rule to be deduced from the American decisions fixing the duty of the common carrier of goods, is well stated by STROUD, J., in the case of *Jenneson v. The Camden & Amboy R. R. Co.*, reported in 4 American Law Reg. 234. After a review of the English and American cases, he announces the law thus: "When goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether that usage was known to the party from whom they were received, or not."

In the case of *Nutting v. Connecticut River Railroad Company*, 1 Gray 502, METCALF, J., in pronouncing the judgment of the court, uses this language in regard to the duty of common carriers: "What, then, is the obligation imposed upon them by law, in the absence of any special contract by them, when they receive goods at their depot in *Northampton*, which are marked with the names of the consignees in the city of *New York*? In our judgment, that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded toward their ultimate destination."

The law as thus ruled has been recognized in a number of well considered cases by the courts of other states, and we regard it as the established rule in this country. Redfield on Railways, § 136, p. 288, note, and cases cited; also, *Hempstead v. New York Central Railroad Co.*, 28 Barb. 485.

The case of *Russell et al. v. Livingston & Wells*, 16 New York Rep. 515, cited by appellees, is not in conflict with this rule, and does not attempt to overrule former decisions of that court, declaring the law as we have stated it. In the case cited, the court held that where the package was addressed to the care of the agent of the common carrier at a point where the article would leave the carrier's route,

The United States Express Company v. Rush and Others.

that such address imposed upon the carrier the duty of retaining the package in the care of his agent at that point, and that any attempt to forward over another line was a violation of the direction given by the consignor, and rendered the carrier liable. In a later volume, (*Quimby v. Vanderbilt*, 17 New York Rep. 306,) DENIO, J., approves the rule theretofore announced by that court. His language is: "The late Court of Errors, in my opinion very wisely, limited the English rule above mentioned, by holding that evidence was admissible to show that by the course of business, a transportation line receiving property without any express contract, undertook only to carry it over its own line, and then place it in the hands of the carriers over the next route, and that it discharged its obligations to the owners by delivering it to a responsible company next in order in its passage to the place of destination."

The Supreme Court of *Massachusetts*, in the case of *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 Allen 254, held that a railroad company receiving goods for transportation to a point beyond its own road, having safely transported the goods over its own line, and delivered them, with the proper address or direction, to the connecting carrier, was not liable for the goods afterward converted by such carrier to his own use, though such connecting carrier proved to be irresponsible.

The answer and reply bring the appellant within the rule of law as we have stated it. The receipt contained no stipulation that the carrier would not, in accordance with the usual custom of business, deliver the package to the next carrier in order. The demurrer should have been sustained to the reply.

The judgment is reversed, at the costs of the appellees, and the cause remanded for further action in accordance with this opinion.

J. Davis, for appellant.

J. Brownlee and *W. March*, for appellees.

EWING v. BATZNER and Another.

APPEAL from the *Franklin* Common Pleas.

RAY, J.—The complaint alleges that the *Laurel Bank* returned to the assessor of the township in which it was located, the sum of \$36,020 as the amount of its taxable property; that the auditor, without giving the notice required by statute, placed upon the duplicate the sum of \$56,000 as chargeable against the bank for taxation, and that the auditor and treasurer of the county seized upon the property described in the complaint, and were about to sell the same for the taxes so assessed; that the property belonged to the plaintiff; that the bank had ceased to exist, and the plaintiff was the owner of most of its stock; that he had been compelled to give a bond to return the property, and he asked an injunction to prevent the sale. A restraining order was issued. Issues were formed and were submitted for trial, and the court rendered the following finding of facts:

1. That the *Laurel Bank* was organized under the general banking law of the State of *Indiana*, passed and approved the 28th day of *May*, 1852.

2. That the said *John W. Ewing*, plaintiff, was, during the existence of the bank, a stockholder of said bank.

3. That *Wm. A. Doughty*, the president of said bank, returned to the assessor the sum of \$36,020, as the value of the bonds, and the amount of the property on which said bank was taxable.

4. That the true amount which should have been returned by said *Doughty*, against said bank, is \$40,750.

5. That after the return made by the said *Doughty*, the auditor of said county placed upon the duplicate, against said bank, the sum of \$56,250, instead of the sum of \$36,020, so returned by said assessor to said auditor, and that no notice was given said *Doughty*, or any officer or stockholder of said bank, that any change in the

Ewing v. Batsner and Another.

amount of said assessment was to be made; and that taxes were assessed thereon, against said bank, to the amount of \$559 49.

6. That the amount of tax on said sum of \$36,020, so returned by the said *Doughty* to said assessor, with interest, and without any penalty, is \$415 00.

7. That all the property seized by said treasurer, for the payment of said tax, was, and is, the individual property of the said *John W. Ewing*, except one new iron safe, which said safe is the property of said bank, and of the value of \$200.

8. That said *Ewing*, after the seizure of said property, replevied the same, executed his delivery bond therefor, and received the same into his possession. That upon the trial of said cause it was adjudged that said property, except said iron safe, was the property of said *Ewing*, and that said safe was the property of said bank, and subject to the tax assessment, and to levy and sale by the defendants, and was of the value of \$200. That, afterward, said *Ewing* was called upon by said treasurer for said property, to be sold for the purpose of making the amount of said tax, and \$145 24, interest, penalty and costs thereon; that *Ewing* executed a bond for the delivery of the same, and retained the possession thereof, and thereupon commenced this suit.

The plaintiff moved the court for judgment in his favor, upon the above facts, but the court overruled the motion. The plaintiff then moved for a new trial, but this motion was also overruled.

The judgment of the court was that the injunction heretofore granted, as to the sale of the new iron safe to pay taxes, be dissolved; that the plaintiff deliver to defendants said iron safe by the 15th of *September*, to be sold for the payment of said taxes, and that the treasurer proceed to sell the same to make the said taxes due from the *Laurel Bank*; that in default of the delivery of said

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safe, the plaintiff pay to defendants \$200. The injunction was made perpetual as to the other property.

Judgment was rendered against the plaintiff for two-thirds of the costs, and against the defendants for one-third.

We think the action of the court in dissolving the restraining order, and refusing the injunction to restrain the sale of the iron safe, the property of the bank, was correct. There is due upon the amount returned by the bank the sum of \$415 00. The safe is only worth the sum of \$200. We do not perceive any equity in the plaintiff's case. He does not offer to return the safe, which is the property of the bank; nor does he tender its value to be applied upon the taxes due on the amount actually returned by the bank. He has no standing in court to recover from the treasurer the property of the bank. He does not offer to do equity, and a court of equity will not lend him its aid to prevent the property of the bank from being subjected to the equitable lien for taxes.

The judgment is affirmed, with 10 per cent. damages, and costs.

W. Morrow, for appellant.

G. C. Holland and *C. C. Binkley*, for appellees.

24	411
165	364

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY
v. DEXTER.

INJURY TO THE PERSON.—PLEADING.—In an action for an injury to the person, caused by the negligence of another, it must appear from the complaint, either by express averment, or by a particular showing of the facts, that the injury complained of occurred without the fault or negligence of the plaintiff.

APPEAL from the *Vanderburgh* Common Pleas.

RAY, J.—The appellee filed his complaint in the Court of Common Pleas of *Vanderburgh* county, alleging "that

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on the 12th day of *February*, 1861, and for a long time previous thereto, he was employed by, and was acting for, said defendant, (appellant,) as a brakeman on board one of the trains running on said railroad, and that on said day, while in the line of his duty as such brakeman and employee, and while attending the rear brake of the train on which he was so employed, and in consequence of the negligence, carelessness and incompetency of one *James Wyant*, who was employed at the time by said defendant as the engineer on another train, and was at the time acting as such engineer and employee, the said plaintiff received a permanent and incurable injury; that the said *Wyant*, as such engineer and employee, and by such carelessness, negligence and incompetency, permitted the train upon which he was at the time so employed upon said road, to run into the train upon which the plaintiff was employed as aforesaid, whereby," &c. The plaintiff also alleged that the defendant had notice of the incompetency, carelessness and negligence of the engineer before the date of the accident.

A demurrer was filed to the complaint, which was overruled by the court. Issues were formed, and a trial resulted in a verdict and judgment for the plaintiff.

The counsel for the appellant insist that there is no sufficient averment in the complaint, that the plaintiff did not, by his own fault or negligence, contribute to the injury received. In the case of *The Indianapolis, Pittsburgh & Cleveland Railroad Co. v. Keeley's Adm'r*, 23 Ind. 133, the averment was that "the said *William H. Keeley*, deceased, was lawfully upon the track of said railroad, at a point within the city of *Indianapolis*." In commenting upon this allegation, the court used this language: "This averment cannot be construed into an allegation that he was not in fault. The defendant's locomotive, and the engineer in charge of it, were, doubtless, lawfully on the track of the railroad; but the complaint is, that so being there, by the carelessness and negligence of those in

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charge of the locomotive, it was run against and over *Keeley*, thereby causing his death. So *Keeley* may have been lawfully on the track, but did he, while there, use the proper care and precaution to avoid injury, or did he, by his own negligence and misconduct, contribute to the fatal result?" This reasoning and the ruling of the court are decisive of the question before us. The averment that the plaintiff, "while in the line of his duty as such brakeman or employee, and while attending the rear brake of the train on which he was so employed, and in consequence of the negligence," &c., cannot be regarded as an averment that he was without fault. It certainly does not express any other fact than is contained in the allegation following it, that he was "attending the rear brake of the train." This was in the line of his duty, but was that duty discharged in a careful manner, or did his conduct, while so engaged, contribute to the injury he sustained? The averment must be either expressly made in the complaint, that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged, that such must have been the case. If the decisions are not entirely uniform and clear in this state, still we regard this as the rule established by the weight of authorities.

The judgment is reversed, at appellee's costs, with directions to the Court of Common Pleas to sustain the demurrer to the complaint.

A. Iglehart, J. E. Blythe, J. B. McDonald and A. L. Roache, for appellant.

A. F. Whittlesey, M. S. Johnson, T. A. Hendricks and O. B. Hord, for appellee.

Seawright and Another v. Coffman.

24 414
132 551

SEAWRIGHT and Another v. COFFMAN.

PLEADING.—COPY OF WRITTEN INSTRUMENT.—Where a pleading is founded upon a written instrument, a copy of the instrument must be filed with the pleading, but if such instrument is only referred to in the pleading, a copy need not be filed.

SAME.—The omission to file a copy of the written instrument upon which a pleading is founded may be taken advantage of by demurrer.

APPEAL from the *Clinton* Circuit Court.

RAY, J.—The complaint alleges that, on the 20th of December, *Seawright* executed to *Munn*, his co-defendant, a promissory note, a copy of which is filed, whereby he promised to pay, &c., to the order of said *Munn*, for the use of the *Frankfort Collegiate Institute*, the sum of, &c., which note was transferred by delivery to the plaintiff, and remains unpaid. That the words for “the use of the *Frankfort Collegiate Institute*,” are and were nugatory and of no effect, for the reason that there was no such legal person, corporation or thing, then or since in being, but that said *Munn* was then engaged in the erection and establishment of a private school, owned by himself, and being built upon his own land, which he proposed to call the “*Frankfort Collegiate Institute*,” and which he was building by subscriptions of money made by different persons. That the defendant *Seawright*, along with many other persons, subscribed to the erection of said institute; that the note was given for the unpaid portion of his said subscription; that at the time of giving the note, a large amount of work had been done and expense incurred in erecting said building; that the note was transferred to the plaintiff for work and labor done by the plaintiff, as a carpenter, in the erection of said building.

The suit is founded upon the note, and, therefore, although the subscription paper is referred to, it was not necessary to make it an exhibit.

The first paragraph of the answer of *Seawright* admits the signing of the subscription paper circulated by *Munn*, for the purposes set out in the complaint, but says that by the terms of said subscription paper, said *Munn* was to erect suitable buildings, and establish an institution of learning, to be called "*Frankfort Collegiate Institute*." The answer then proceeds to aver the conditions and stipulations contained in the subscription paper, and that he executed his note for the balance of the sum subscribed by him, but that said *Munn*, disregarding the spirit and letter of the above named stipulations, refused to resume work on said building, but, before said note became due, totally abandoned said enterprise, and left the county, and suffered judgment to be taken against him, and the property sold, wherefore the consideration wholly failed.

The plaintiff demurred to this paragraph of the answer. The entire defense rests upon the terms of the subscription, and yet the defendant has failed to file a copy of the paper. The allegations of what it contained are not sufficient; a copy of the paper upon which this plea rests should have been filed, and the failure to do so was available on demurrer. *Little et al. v. Vance*, 14 Ind. 19; *Laughery v. McLean*, *id.* 106; *Price v. Grand Rapids & Indiana R. R. Co.*, 18 Ind. 58; *Hillis v. Wilson*, *id.* 146.

The second paragraph of the complaint contains allegations of fraud, but the fraud charged consists in promises and failures to perform, and the plea rests upon the agreements and stipulations contained in the subscription paper. We cannot decide whether the failure of *Munn* to keep his promises would constitute a defense to the action, or not; certainly it did not support a plea of fraud. We cannot determine, without an inspection of the paper, whether the defendant *Seawright* was absolutely bound to pay his subscription, or whether his promise was conditional. If the promise was absolute, any subsequent agreement made by *Munn* may have been without consideration, and would, therefore, furnish no defense to the action. The averments

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contained in the answer stating the condition of the subscription cannot be considered, as they cannot supersede a compliance with the express requirement of the statute.

In the ruling of the court in sustaining the demurrer to the first and second paragraphs of the answer there was no error.

The judgment is affirmed, at the costs of the appellants, with five per cent. damages.

L. McCarg, for appellants.

R. P. Davidson, for appellee.

RAYMOND v. WILLIAMS and Others.

APPEAL from the *Wayne* Circuit Court.

GREGORY, J.—This suit was commenced in the court below, on the 2d of *July*, 1862, by the appellees, against the appellant, on a promissory note for \$304 64, due *November* 10th, 1854. The plaintiffs, in their complaint, demand judgment for \$500, and for all other proper relief. The defendant answered, first, by a general denial; second, that the consideration of the note had partially failed, to-wit, the sum of \$186 78, in this: that the plaintiffs had agreed to furnish and surrender to the defendant two notes against *C. F. Cramer & Co.*, of the state of *New York*, dated *March* 18th, 1848, one at four months for \$65 70, and the other at three months for \$45 00, both amounting, with interest, after deducting credits, to the sum of \$186 78, which notes the plaintiffs had failed to surrender as they agreed; third, usury. Reply, general denial. Trial by the court, on the 23d of *February*, 1865; finding for the plaintiffs in the sum of \$512 25; motion for a new trial overruled, and judgment on the finding. The plaintiff in the court below remitted \$12 80. The evidence is in the record. It is urged that the finding of the court is not sustained by the

Raymond v. Williams and Others.

testimony. The note sued on was given by the appellant in settlement of an account and two notes against *Cramer & Co.*, the defendant being a member of that firm. There is no proof that usurious interest was computed. Seven per cent. interest was calculated on the two small notes, but, for aught that appears in proof, that was the legal interest. The notes bear date in *New York*. It is true, the statutes of *New York* were not given in evidence, but usury was the defense, and the onus was on the defendant; and, moreover, the excess of interest over six per cent. did not amount to \$6, not one-half the amount remitted.

It is contended that the finding was for \$12 25 more than was claimed, and that this was error. The sum claimed was largely more than was due on the note at the commencement of the action, but, owing to the unusual delay, the interest accumulated until the amount due at the trial was greater than that demanded in the complaint. The case of *Webb et al. v. Thompson*, 28 Ind. 428, meets and settles this question fully.

Raymond swore that the two small notes were to have been surrendered to him. Two of the plaintiffs swear that the consideration of the note sued on was the settlement of the two notes and the account against *Cramer & Co.*; and one of them testifies that the notes were retained for the purpose of holding *Cramer*, the other partner. In 1855, the defendant promised payment of the note in suit as soon as he could sell some railroad securities held by him. There is no proof that the defendant ever demanded the surrender of the two notes. We think the finding is sustained by the evidence.

The judgment is affirmed, with ten per cent. damages, and costs.

G. A. Johnson and *L. Develin*, for appellant.

M. Wilson, for appellees.

34	418
135	153
24	418
139	322
24	418
154	136
154	412

GROVES v. RUBY and Another.

PROMISSORY NOTE—ASSIGNMENT OF PART INTEREST.—A part interest in a promissory note may be assigned in equity, and the assignee, being the real party in interest, can, under our statute, join with the owner of the other interest in an action upon the note.

PRACTICE.—DEFECT OF PARTIES.—If a defect of parties be not objected to by demurrer or answer, the objection is waived.

PRACTICE.—INTEREST AFTER VERDICT.—Six months having intervened between the finding of a verdict and the judgment, the court, in rendering judgment, allowed interest from the date of the verdict.

Held, that the objection to the allowance of interest on the verdict could not be raised by a motion for a new trial, or in arrest of judgment.

APPEAL from the *Clinton* Circuit Court.

GREGORY, J.—Suit by *Ruby* and *Yaryan*, on a promissory note executed by the appellant, payable to *Kramer* and *Ruby*, upon which was this assignment: "For value received, I assign my half of the within note to *John Yaryan*, April 1, 1860. [Signed,] *Thomas Kramer*." Demurrer to the complaint for the following causes: 1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiffs. 2. The said *Yaryan* is improperly joined as a co-plaintiff. The demurrer was overruled, and that presents the first question for consideration. It is urged that a part of a written contract cannot be assigned. This may be true in law, but not in equity. *Wood v. Wallace et al.*, ante, p. 226; 2 Story's Eq. Jur., § 1044, and the authorities there cited. The assignment vested in *Yaryan*, *Kramer's* interest in the note, in equity. *Yaryan* thereby became the real party in interest with his co-plaintiff, and they were the proper parties. 2 G. & H., § 3, pp. 34 and 35. The question as to whether *Kramer* ought to have been made a party defendant, to answer as to his interest in the note, is not raised by the demurrer, and is not in the record. If a defect of parties be not tested by demurrer or answer, it is waived. *Womack v. McAhren*, 9 Ind. 6; *Rogers v. West*, id. 400; *Mewherter v. Price*, 11 Ind. 199;

Adkins v. Hudson, *id.* §72. The defendant answered in five paragraphs. First, want of consideration; second, fraud and counter-claim; third, fraud and want of consideration; fourth, fraud of the payees in procuring the execution of the note, and want of consideration; fifth, set-off. Reply, general denial.

The action was commenced on the 28th of October, 1861, and was tried on the 9th, 10th, 11th and 12th of October, 1863. The case had been continued for six months, on the oral affidavit of the defendant. On the 8th of the last named month, the defendant filed his affidavit, and moved for a continuance of the cause, on account of the absence of a witness. The witness resided in an adjoining county. The subpoena was taken out during the term, and on the day after that on which the case was set for trial, and was served by the defendant himself, who found the witness unable to attend court, on account of injuries received by the running away of a team. We have carefully looked through the record, and think that the defendant was not injured by the refusal of the court to continue the cause. The affidavit was not sufficient to show the materiality of the facts expected to be proved by the absent witness, when applied to the issues.

The jury rendered their verdict for the plaintiff on the 12th of October, 1863, for \$786 82, and the court rendered judgment on the 18th of April, 1864, for \$810 45, allowing interest on the verdict from the rendition thereof; and this is assigned for error. Motions for a new trial, and in arrest, were overruled, but we do not think either of them was the proper method of raising the question as to the allowance of interest on the verdict. We do not regard this question as properly before the court, and therefore give no opinion as to the correctness of the action of the court below.

The court below committed no error in overruling the motion for a new trial upon the testimony, for the reason that the evidence abundantly sustained the verdict. The

Groves v. Ruby and Another.

note was executed on the 8th of *March*, 1858; due on the 1st of *December* following. The consideration of the note was the settlement of a partnership transaction, in which the defendant was an active participant, with the means of knowledge of all the facts in the case. The partnership was in the purchase and sale of hogs, and the purchases were made by the defendant himself. A part of the hogs were sold at *Thorntown*, near the place of purchase, and the residue were sold at *Cincinnati, Ohio*. The settlement was made long after the partnership transactions were closed, and was several days in progress, and was only effected after the defendant had urged every objection he could think of. There was no fraud, and the only mistake complained of was the omission, on the part of the defendant, to claim damages for an alleged delay in a shipment of hogs from *Thorntown*, occasioned by the failure of the payees of the note to furnish money, under the partnership contract, to pay for the hogs. We think that the defendant had no right to purchase until the money was first furnished, and that the damages, if any were sustained, were the result of his own wrong.

There were interrogatories put to the jury by the court, on the motion of the plaintiffs, and answered by the jury. These interrogatories were pertinent to the issues, and proper. 2 G. & H., § 336, p. 205.

There are a number of objections urged to the action of the court below in giving and refusing instructions to the jury. We do not think any of these objections well taken, and as substantial justice was done, (2 G. & H., § 101, p. 122,) we do not think we are required, under the constitution and law, to notice them in detail, as an error in giving or refusing instructions can only be reviewed by this court in considering the motion for a new trial.

The judgment is affirmed, with costs, and ten per cent. damages.

J. N. Sims, for appellant.

R. P. Davidson and *J. Yaryan*, for appellees.

Lane and Another v. The State, on the relation of Albert, Adm'r of Harmon.

LANE and Another v. THE STATE, on the relation of ALBERT,
Administrator of HARMON.

APPEAL from the *Orange* Common Pleas.

RAY, J.—Action upon an administrator's bond. A demurrer was filed to the complaint, which was overruled by the court.

The complaint alleges that the bond was given "for the purpose of continuing the letters of administration." This renders it clear that a former bond had been given, as no letters of administration can issue except upon the filing of a bond. 2 G. & H., § 19, p. 489. This bond, then, may have been required by the court because the sureties upon the first bond were insolvent, or because the penalty of the first bond was insufficient; in either of which cases, the sureties upon the bond set out in the present suit would not be liable until the remedy upon the first bond had been exhausted. Or the present bond may have been required by the court upon the application of the sureties upon the first bond to be discharged from further liability, in which case, the defendants in this action might be held liable for a default in not paying over money collected after the execution of the present bond. It will be seen from the complaint, that it does not aver facts sufficient to enable us to determine whether there is any liability resting on the sureties in the present bond to answer to this action. The demurrer, therefore, filed by the sureties, should have been sustained. The defendants (the sureties) answered in two paragraphs, to each of which a demurrer was sustained. The demurrer should have reached back to the complaint, and have been sustained to that, as even a bad answer is sufficient to a bad complaint.

The appellee insists that the words, "continuing the letters," should be treated as surplusage. We cannot so regard them. They are an averment of fact, and, if true,

Rockhill v. Nelson and Others.

the other facts stated in the complaint are not sufficient to show a cause of action against the appellants.

The cause is reversed and remanded, with directions to the court below to sustain the demurrer filed by the sureties to the complaint, and grant leave to the plaintiff to amend.

F. Collins, F. Wilson and A. M. Black, for appellants.

A. J. Simpson, J. E. McDonald and A. L. Roache, for appellee.

24	422
128	376
94	422
134	187
24	422
149	500
24	422
171	370

ROCKHILL v. NELSON and Others.

STATUTE OF DESCENTS.—*Martindale v. Martindale*, 10 Ind. 566, and *Oyle v. Steepe*, 11 *id.* 389, affirmed.

APPEAL from the *Allen* Circuit Court.

GRIGORY, J.—The plaintiff in this case is the widow, having been the third wife, of *William Rockhill*, who died seized in fee simple of the land in dispute. He had by the plaintiff one child, which died, in infancy, a short time before his death. The defendants are the children of the deceased husband by a former wife. The widow claims one-third of the land of which her husband died seized, in fee. The defendants insist that she is entitled to a life estate only.

The rights of the parties depend upon the construction to be given to our law of descent.

By the seventeenth section of that law, the surviving widow takes one-third, in fee, of all the lands of which the husband died seized. By the twenty-seventh section, she takes, as the heir of her husband, one-third, in fee, of all the land owned by the husband *at any time during coverture*, in the conveyance of which she has not joined, and one-third, absolutely, of all equitable estates owned by him at

his death. Under these sections, the plaintiff would take one-third of the real estate of her deceased husband in fee. The only inquiry will be, how, and to what extent, does the proviso to section 24, (1 G. & H. 296,) affect or modify sections 17 and 27; the former preceding, and the latter following section 24? The proviso is in these words: "*Provided, that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children.*"

In an able and well considered brief, the learned counsel of the appellant argue thus: "The language of this proviso is, in some respects, unmistakably clear. Something descends to the wife. What is it? If anything, it is one-third of her husband's real estate, not a life interest in his real estate. The proviso does not intimate such a thing. If the one-third does not descend to the widow, to whom does it descend? Not to the children or heirs, for by the clear and express words of the proviso, they take whatever they may be entitled to, not at the death of the husband and father, but at the death of the widow. They take, not from the father, but from his widow. They take from her, at her death, nothing but what she, as heir of her deceased husband, took at his death. If she takes less than a fee, the children take nothing at all. Prior to the widow's death, they can have no interest in the land which descends to her at her husband's death.

"If it shall be said that the widow takes but a life estate, then this clause, which by a strained and unnatural construction is made to reduce the widow's interest from a fee to a life estate, becomes absurd and nonsensical. For it is too clear to admit of doubt, unless words have lost all significance, that it was the purpose of this proviso to cast upon the husband's children, at the death of the widow, whatever she might then possess as the heir of the husband. To give effect to the plain and obvious meaning of this proviso, it must be held, we think, that the *whole* interest in

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one-third of the deceased husband's lands descends, at his death, to his widow. That no part of this interest *then* descends to his children, for the simple reason that it is to descend to them, if at all, at the death of the widow. That it simply prescribes a rule of descent, making the husband's children, in the particular case, the special, substituted heirs of the second or subsequent wife."

This position, so forcibly put, addressed to this court before the decision in the case of *Martindale v. Martindale*, 10 Ind. 566, would have been entitled to grave consideration; and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property, long recognized and acted upon, and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute book, is not remarkable for precision and clearness, and that vexatious questions are often occurring, requiring judicial interpretation of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the court of last resort, is unjust, or even distasteful, the legislature can change the rule by a new statute, without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion in *questions of property*, by overruling the previous decisions of this court. We have had occasion, in the last few months, to overrule a number of cases, but only in that class in which the rulings operate upon the future, and not upon the past, and which, in our opinion, will be attended by unmixed good.

The cases of *Martindale v. Martindale*, *supra*, and *Ogle et al. v. Stoops et al.*, 12 Ind. 380, were decided some six or seven years ago, and the rule therein established has

Fitch and Another v. The City of Madison and Another.

been acquiesced in by the legislature through three general, and one special, sessions, and ought not now, in our opinion, to be disturbed by this court.

The judgment is affirmed, with costs.

J. L. Worden and Morris & Williams, for appellant.

W. H. Coombs, for appellee.

FITCH and Another v. THE CITY OF MADISON and Another.

CITY OF MADISON.—TAXATION.—The charter of the City of *Madison* provides that a tax for municipal purposes may be assessed upon all personal property owned by, or in the possession of, any inhabitant of the city, "except goods and produce for export, or in transit." A, being engaged in pork packing in said city, and having all of his capital invested in pork held for export, and in process of shipment to a foreign market, refused to return the same for taxation, and was thereupon assessed for "capital invested in pork, \$50,000," and taxes charged against him upon that sum.

Held, that the assessment was illegal, because the property, if taxable, should have been assessed as pork, and not as "capital."

Held, also, that the pork, being "produce for export," was not subject to taxation under the city charter.

The City of Madison et al. v. Fitch et al., 18 Ind. 83, overruled.

APPEAL from the Jefferson Circuit Court.

ELLIOTT, C. J.—The appellants filed their complaint in the Circuit Court to enjoin the collection of certain city taxes, alleged to have been illegally assessed against them. A demurrer was sustained to the complaint. The principal question raised is as to the power of the city, under its charter, to levy a tax on the capital invested by the appellants in pork, for export to a foreign market.

The facts alleged in the complaint, so far as it is necessary to state them for the purpose of a proper understanding of the question, are these: *Fitch & Son* were residents of the City of *Madison, Ind.*, and, for several years, were

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engaged in the business of buying, slaughtering and packing pork, which they shipped to, and sold in, a foreign market. They had from thirty to thirty-five thousand dollars of capital invested in the business in the years 1860 and 1861. Between the 1st of *April* and the 1st of *July* of those years, their entire capital was invested in pork, then ready for, and in process of, transportation. They had no money on hand during that period. In the month of *May* of each of those years, they were called upon by the city assessor for a list of their personal property subject to taxation for city purposes, but they informed the assessor that they had no personal property subject to taxation by the city; that their entire capital was then invested in pork for export, which they claimed was not subject to taxation by the city. But the assessor, afterward, without their knowledge or consent, each of said years, entered upon his assessment roll, and assessed against them, as "capital invested in pork, \$50,000." Upon this sum, the city council made a levy for the year 1860 of ninety-five cents on each \$100, and for the year 1861 of seventy-five cents on each \$100. The city collector was proceeding to levy and collect the same by a sale of their personal property.

The city is governed by a special charter granted in 1848, and amended in 1849. The original charter subjected to taxation "all real estate, including improvements, situate within the corporate limits of said city; and also a like tax upon *all personal property* belonging to the residents of said city, or *that may be in the possession of said residents.*" The charter as amended in 1849, subjects to be taxed, all real estate, &c., and all personal property, except "goods and *produce for export, or in transit*, owned by, or in the possession of, any inhabitant of the city," &c.

The assessments in this case, of "capital invested in pork," are clearly illegal. The charter authorizes the city to levy a tax on "*personal property*," not on the capital invested in a particular business, or in specific property.

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Money on hand is personal property, and, if not exempt, is liable to be taxed as such, but when it is invested in other personal property it is no longer money. Here it is shown by the complaint, that at the time of these assessments, *Fitch & Son* had in their possession, in the city of *Madison*, a large amount of pork, greatly exceeding in value their actual capital, or the amount assessed against them. Their entire capital was invested in the pork, and if subject to a city tax it was as pork, and not as capital invested in pork. If the pork was liable to be taxed, the whole, and not merely a part of it, was so liable. The assessment of "capital invested in pork" was not authorized by the city charter, and is, therefore, illegal.

But, under the averments in the complaint, was the pork in possession of *Fitch & Son* liable to be taxed? The solution of this question depends upon the meaning of the words, "goods and produce for export," as used in the amended charter.

This question was presented to this court in a former case between the same parties, and is reported in 18 Ind. 33. And while we fully concur in the principle laid down by the court in that case, that "it is a settled rule that laws exempting property from taxation are to be strictly construed," we cannot concur in the conclusions arrived at by the court in the application of that principle to the case under consideration. Indeed, it seems apparent that a very full consideration was not given to the question in that case.

By the charter of the city, personal property in the possession of a resident of the city, between the 1st of *April* and the 1st of *July* of the same year, and subject to taxation, is liable to be assessed for the current year. In the case at bar, it is averred in the complaint that *Fitch & Son*, during all that time, had no money or other personal property except their pork, all of which was for export, and was then in process of being exported to a foreign market. *Pork* is clearly included within the word *produce*,

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used in the exception in the amended charter. It was, then, "*produce for export*," and within the very letter of the statute.

Madison is a commercial city; many of her citizens were engaged in trade and commerce; in purchasing the products of the surrounding country, brought there for market by the railroads and other means of conveyance, and in exporting or shipping them by the river to *New Orleans* and other distant markets, beyond the limits of the state. It was the common interest of the city that this trade and commerce should be encouraged, as it aided in bringing to the city both population and wealth. And it is proper that the amendment of the charter, which we may infer was enacted at the request, or with the assent, of the people of that city, or their representatives, should be construed in the light of these surroundings.

Under the original charter, all personal property *owned by, or in the possession of*, a resident of the city, was subject to be taxed. Under that provision, the resident dealer in produce was not only taxed to the extent of the capital used by him in his business, but he was taxed on all the property in his possession, whether owned by himself or others, while the non-resident dealer would not be liable to be taxed at all. This discrimination would necessarily operate onerously on the resident dealer. Under these circumstances the amendment was adopted, providing that taxes might be levied on all personal property owned by a resident, except "*goods and produce for export, or in transit, owned by, or in the possession of, any inhabitant of the city.*" The original charter taxed the produce owned by the resident dealer, though held for export. This provision was evidently deemed unjust or wrong, otherwise no amendment would have been regarded as necessary. The amendment, however, was made, and by its terms exempts from taxation *goods and produce for export, or in transit, owned by, or in the possession of, any inhabitant of the city.*

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As a matter of policy, the exemption may go too far, though it only placed the resident dealer on an equality with the non-resident one; but that was a proper matter for the legislature.

We think that the pork owned by the appellants *for export*, was exempt by both the letter and spirit of the amended charter, and that the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded to the Circuit Court for further proceedings in accordance with this opinion.

C. E. Walker and *M. G. Bright*, for appellants.

J. Sullivan, for appellees.

CASE v. BUMSTEAD and Others.

VENDOR'S LIEN.—A sold to B certain real estate, by a contract in writing, for the sum of \$2,500. By the terms of the contract, A was to execute a deed of conveyance, on the payment of \$1,000, at a day fixed, and was to receive the notes of B for the residue of the purchase money, payable at one and two years from date. It was further stipulated that on the execution of the deed, B should have possession of the premises, "free from rent or charge." The deed was executed and delivered at the time stipulated. Afterward, A caused the execution of the contract of sale to be proved by the subscribing witness, and the contract to be recorded in the recorder's office. Suit by A to enforce a vendor's lien against the vendees of B, who had purchased after the recording of the contract of sale, but without actual notice of the equitable lien.

Held, that section 35 of the "Act concerning real estate and the alienation thereof," 1 G. & H. 266, authorizes the recording of executory contracts for the sale of lands, and the record of such an instrument is constructive notice of its contents to all subsequent purchasers or mortgagees.

Held, also, that while the record of the deed from A to B was *prima facie* evidence that the purchase money had been paid, the record of the original contract of sale was notice to all subsequent purchasers that a portion of the purchase money remained unpaid, and constituted an equitable lien upon the land.

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Held, also, that the stipulation in the contract, that B was to have possession on the execution of the deed, "free from rent or charge," was not a waiver or release of the vendor's lien.

APPEAL from the *Pike* Circuit Court.


ELLIOTT, C. J.—Complaint by *Case*, the appellant, against the appellees, to enforce a vendor's lien on real estate.

The facts of the case, as alleged in the complaint, are substantially these: *James Evans*, being seized in fee of certain real estate, situate in *Pike* county, on the 3d of *November*, 1855, bargained and sold the same to *N. R. & E. S. Alford*, by an agreement in writing, signed by the parties, as follows:

"Article of agreement made and entered into the 3d day of *November*, 1855, between *James Evans*, of *Pike* county, *Indiana*, of the one part, and *Nathan R. Alford* and *Elijah S. Alford*, of the same place, of the other part, witnesseth: that the said *James Evans* has this day sold to the said *Elijah S. Alford* and *Nathaniel Alford*, the equal, undivided half of the following described tract of land, lying and being in said county of *Pike*," (describing it,) "containing one hundred and fourteen and one-half acres. The said *Alfords* agree to pay to said *Evans*, as consideration money therefor, one thousand dollars on or before the 1st day of *April*, 1856, and, upon making such payment, to execute to said *Evans* their two notes of hand, one payable on the 25th day of *December*, 1856, for one thousand dollars, and one for five hundred dollars, payable *December* 25th, 1857; said notes to bear interest from date. Now the said *Evans*, on his part, agrees, upon receipt of the first payment as aforesaid, and upon the execution of the notes aforesaid, to make and execute to the said *Alfords* a good and sufficient deed in fee simple for said tract of land, and also to give to them possession of the premises, including houses, free from rent or charge.

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"In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

[Signed,] ^{his}
 JAMES  EVANS. [SEAL.]
 ^{mark.}
 N. R. & E. S. ALFORD. [SEAL.]"

"Attest: JOHN McINTIRE."

On the 24th of *March*, 1856, the *Alfords* paid to *Evans*, on the contract, \$1,000, and executed to him their two promissory notes, one for the sum of \$1,000, payable on the 25th of *December*, 1856, and the other for the sum of \$500, payable on the 25th of *December* 1857. They describe the land, and show that they were given in part consideration therefor. *Evans*, on the same day, executed and delivered to the *Alfords* a deed of conveyance in fee for the land, as required by the terms of the written contract.

On the 9th of *April*, 1856, *Evans* procured the execution of the written agreement to be proved before the recorder of *Pike* county, by *McIntire*, the subscribing witness, a certificate of which proof was duly indorsed on the agreement by the recorder, and the agreement and certificate were then recorded in the recorder's office of said county.

On the 25th of *April*, 1856, *Evans* sold, and transferred by indorsement in writing, both the promissory notes executed to him by the *Alfords*, to *Case*, the plaintiff.

N. R. & E. S. Alford, afterward laid off and platted the lands into town lots, named the town *Alford*, and had said plat duly acknowledged, and recorded in the recorder's office of the county of *Pike*. The defendant, *Rhoda Bumstead*, afterward became the purchaser, and is now the owner, of a large number of said lots, particularly described in the complaint.

The complaint also avers that the notes remain due and unpaid, and that *N. R. & E. S. Alford* long since failed in business and removed from this state, and that they, nor

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either of them, have now, nor within the last five years have had, any property in this state subject to execution. The complaint prays that the amount due on said notes may be declared a lien on said lots, now owned by said *Rhoda Bumstead*, and, unless the same be paid, that a sale of said lots be decreed for the payment thereof, &c.

Publication was made as to the defendants, *Nathan R.* and *Elijah S. Alford*, and they were defaulted. *Rhoda Bumstead* appeared and demurred to the complaint. The court sustained the demurrer, and, thereupon, rendered final judgment for the defendants.

The only question urged for the reversal of the judgment of the Circuit Court arises upon the ruling of that court in sustaining the demurrer to the complaint.

It is not averred in the complaint that *Rhoda Bumstead*, at the time she purchased the lots and received a title to them, had *actual* notice of the existence of the notes to *Evans*, and that they were given for a part of the purchase money of the land by *N. R. & E. S. Alford*, but it is averred that she had constructive notice thereof, by the recording of the article of agreement between the parties, in reference to the purchase.

Section 85 of the "Act concerning real estate and the alienation thereof," 1 G. & H. 266, provides that "every executory contract for the sale or purchase of lands, when proved or acknowledged in the manner prescribed in this act for the proof or acknowledgment of conveyances, may be recorded in the county in which the lands to which such contract shall relate may be situate; and when so proved or acknowledged, and the record thereof when recorded, and the transcript of such record when duly certified, may be read in evidence in the same manner, and with the like effect, as in the case of a conveyance."

This provision of the statute authorized the contract between *Evans* and the *Alfords* to be recorded, and the recording of an instrument, authorized by law to be recorded, operates, in judgment of law, as constructive

notice to all subsequent purchasers or mortgagees of the contents of such instrument. *Lasselle v. Barnett*, 1 Blackf. 151; *Reed v. Coale*, 4 Ind. 283. This contract having been duly proved and recorded before *Rhoda Bumstead* purchased the lots, she must, therefore, be presumed to have purchased with notice of its contents.

Assuming, then, that she had notice of the existence and contents of the contract, the question is presented, are the facts stated in the contract sufficient to charge her with notice, after the execution of the deed by *Evans* to the *Alfords*, that a part of the purchase money still remained unpaid? It was evidently the object of *Evans*, in procuring the contract to be proved and recorded, to assert his equitable lien on the land for the unpaid purchase money, and to give notice thereof to all who might become interested. Its covenants, in other respects, had been fully performed before it was recorded, by both parties; and, except as a means of giving such notice, its recording would have been a useless expense. The facts shown by the contract are, that the whole consideration for the land was \$2,500; that of this sum the *Alfords* were to pay \$1,000 on the 1st of *April*, 1856, at which time *Evans* was to execute to them a deed for the land, and, at the same time, they were to execute to *Evans* their promissory notes, one for \$1,000, payable on the 25th of *December*, 1856, and the other for \$500, payable *December* 25th, 1857.

By the record, then, *Mrs. Bumstead* was notified that the *Alfords* were to receive a conveyance for the land long before they were to pay \$1,500 of the purchase money, and that, at the same time of the execution of the deed to them, they were to execute to *Evans* their two promissory notes for that \$1,500. While the record of the deed afforded *prima facie* evidence that the purchase money was fully paid at its execution, the record of the original contract gave notice that, by its terms, the deed was to be made and delivered, leaving \$1,500 of the purchase money to be paid at a distant future time. The reasonable inference to

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be drawn from these facts would seem to be that the deed was executed under and according to the original contract, and that a part of the purchase money, therefore, was not paid at or before the execution of the deed. And these facts, it seems to us, should be deemed sufficient to have put *Mrs. Bumstead* on her guard, and to require that she should have made the proper inquiry, by which she could have readily ascertained that the notes for the \$1,500 were still unpaid and outstanding, and constituted an equitable lien on the land for their payment.

No brief has been filed in the case by the appellee's counsel, and hence we are not directly advised of the grounds assumed in support of the demurrer in the court below; but we are informed by the appellant's brief that it was insisted, in the Circuit Court, that the lien that might otherwise have attached, was discharged by a stipulation in the original executory contract between the parties. It was therein stipulated that on the receipt of \$1,000 of the purchase money, and upon the execution by the *Alfords* of the notes for the remaining \$1,500, *Evans* should "make and execute to the said *Alfords* a good and sufficient deed in fee simple for said tract of land, and also give to them possession of the premises, including houses, free from rent or charge." And it was urged in the Circuit Court, as we are informed by the appellant's brief, that as the vendor's lien for the unpaid purchase money is a charge upon the land, the stipulation in the agreement in this case, that the *Alfords* were to have the possession of the lands and houses, "free from rent or charge," was a waiver of any lien for the purchase money, and discharged the land therefrom.

We do not think that such a conclusion can be legitimately drawn from that provision or expression in the contract, when fairly construed in connection with its other provisions. The deed was to be made by *Evans*, and possession given, when only two-fifths of the purchase money were paid. Yet it was provided that the *Alfords*

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were to have the possession of the land and houses, "free from rent or charge;" that is, free from rent or charge for, or on account of, such possession or use of the property. The term "*charge*" is used in immediate connection with "rent," and if not intended to mean the same thing, at least refers to the same subject matter, viz: the possession, use and occupancy of the land, and the houses thereon, and does not, as we think, have any reference to the equitable lien or charge upon the land, given by the law, for the unpaid purchase money.

No other security was given or provided for, and we see nothing in the contract indicating any intention on the part of *Evans* to waive the lien. We think the Circuit Court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs.

W. E. Niblack and *W. H. De Wolf*, for appellant.

J. G. Jones, for appellees.

HOLLINGSWORTH v. PICKERING.

CREDIBILITY OF WITNESSES.—**PRACTICE.**—It is the exclusive province of the jury to determine the credibility of witnesses, and the Supreme Court will not examine into their action for the purpose of disturbing the verdict.

AWARD.—An award which is indefinite and uncertain, and incapable of being made certain, is void.

APPEAL from the *Howard* Circuit Court.

ELLIOTT, C. J.—This was a suit by *Pickering*, the plaintiff below, against *Hollingsworth*, the appellant, to recover in damages the consideration paid by the former to the latter for a tract of land in the state of *Iowa*, on the ground that, at the time of the sale and conveyance,

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Hollingsworth falsely represented to *Pickering* that the land was situated in a particular locality, (which is stated,) and that it was all good, dry, plow land, and that, if not as represented, he would take it back and refund the \$600, the price paid for it, with interest.

The complaint avers that the land is not situated as represented, and that the whole of it is a swamp covered with water, and of no value whatever; and that, before bringing the suit, he, *Pickering*, tendered to *Hollingsworth* a deed reconveying to him the land, and demanded the purchase money, with interest, which *Hollingsworth* refused to pay.

An answer was filed to the complaint in two paragraphs:

1. General denial.
2. That the same cause of action mentioned in the complaint, by agreement of the parties, had been submitted to the arbitrament of twelve persons, and that they had heard the matter, and rendered their award in writing, in favor of said plaintiff below, and against said *Hollingsworth*, for the sum of \$100, which sum he was ready and willing to pay.

A demurrer to this paragraph of the answer was filed, and overruled by the court, and the plaintiff then replied by a denial.

There was a trial by jury, and a verdict for the plaintiff. A motion for a new trial was overruled, and judgment rendered on the verdict.

Two questions are presented for our consideration:

1. Is the verdict of the jury, under the issue formed by a denial of the complaint, sustained by the evidence?
2. Is the award set up in the second paragraph of the answer valid, or is it void for uncertainty?

The evidence is in the record. It is very conflicting in regard to the alleged representations as to the locality and quality of the land sold by *Hollingsworth* to *Pickering*, in *Iowa*; but the evidence of *Pickering*, if taken as true, fully

sustains the complaint on those points. It is directly contradicted by the testimony of *Hollingsworth*. It was, therefore, a question of credibility between the witnesses, which it was the exclusive province of the jury to determine, and we cannot examine it for the purpose of disturbing the verdict.

The second question, however, merits a more extended consideration.

Copies of the agreement of submission, and of the award of the arbitrators under the same, were filed with the second paragraph of the answer, and thereby made a part of the record. The originals were given in evidence on the trial, and other evidence was also given, which is uncontradicted and unimpeached, by which it is clearly shown that this suit is founded upon the same subject matter and claim submitted to and passed upon by the arbitrators. If the award was a valid one, it was final between the parties, and constituted a good bar to the present action; and if so, the finding of the jury was clearly wrong, and the court below should have granted a new trial. But if, as contended by the appellee, the award is void for uncertainty, apparent on its face, the court below erred in overruling the demurrer to the second paragraph of the answer, as it constituted no defense to the action; and, in that event, the appellant has no cause to complain that a correct result was reached by the verdict of the jury.

The following is a copy of the agreement of submission under which the award was made:

“Know all men concerned, that we, the undersigned, have this day submitted to the judgment of” (here follow the names of the twelve arbitrators,) “a matter of difference between us, arising out of a certain agreement made by and between us, in the autumn of the year 1858, wherein *Phineas Pickering* claims of *Isaac Hollingsworth* seven

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hundred and eighty (780) dollars. Now, therefore, we do hereby agree to submit said matter of difference between us to the above named friends, for their final decision, pledging ourselves to abide their judgment therein.

[Signed,]

PHINEAS PICKERING,
ISAAC HOLLINGSWORTH.

10th mo., 8d, 1862."

The award given in evidence reads thus :

"We, the arbitrators to whom the matters of difference between *Isaac Hollingsworth* and *Phineas Pickering* were this day submitted, submit as our award, that *Isaac Hollingsworth* pay *Phineas Pickering* one hundred dollars, within thirty days from this date. Also, pay the difference between the tax receipt and the note that *Phineas* holds against him. [Signed by the twelve arbitrators.]

10 mo., 8d, 1862."

The matter submitted to the arbitrators was a difference between the parties, arising out of a certain agreement between them, made in the autumn of the year 1858, in which *Pickering* claimed of *Hollingsworth* \$780; and we must infer, in the absence of a showing to the contrary, that the note and tax receipt related to the agreement and the matter of difference between the parties, and was, therefore, a proper matter for the arbitrators to pass upon. The note and tax receipt are not set out in the award, nor do they accompany it; they are not even referred to by date or amount so that they can be identified, or the difference between them ascertained. The award, therefore, is indefinite and uncertain, and incapable of being made certain, and, for that reason, must be held to be void. *Parker v. Eggleston*, 5 Blackf. 128; *Hays et al. v. Hays*, 2 Ind. 28. It did not constitute a defense to the action, and the judgment must, therefore, be affirmed.

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The judgment is affirmed, with 1 per cent. damages, and costs.

Linsday & Lewis, for appellant.

H. A. Brouse, T. A. Hendricks and O. B. Hord, for appellee.

WINSHIP and Others v. CLENDENNING.

INJUNCTION BOND.—An injunction bond was entitled "*State of Indiana, Clinton county, A v. B.*"

Held, that the bond was not void for the failure to state the name of the court in which the action was brought.

EVIDENCE.—RECORD OF DEED.—The record of a deed may be given in evidence without accounting for the absence of the original.

PRACTICE.—SUIT ON INJUNCTION BOND.—In an action upon an injunction bond, it is not necessary that a copy of the proceedings and judgment in the injunction case should be filed with the complaint.

SAME.—DAMAGES.—A having the right to the possession of certain real estate, under a purchase by title bond, was enjoined, at the suit of B, from exercising that right, and from entering upon the land.

Held, that in a suit upon the injunction bond, A was entitled to recover for any injury to the possession, or to the land itself, caused by the injunction.

SAME.—An injunction having been granted to continue until the determination of a case in the Supreme Court, the latter case was subsequently dismissed, but the appeal was afterward "reinstated," and the case decided upon its merits.

Held, that it must be understood from the record that the dismissal of the case in the Supreme Court was set aside and the case reinstated, and this being the case, the injunction was continued in force, and, in an action upon the injunction bond, damages accruing after the dismissal could be recovered.

APPEAL from the *Clinton Common Pleas*.

ELLIOTT, C. J.—This was a suit brought by *Clendenning*, against the appellants, on the following written obligation :

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"*Edwin Winship,*
v.
James Clendenning. } State of *Indiana, Clinton County.*

"We undertake that the plaintiff, *Edwin Winship*, shall pay to the defendant, *James Clendenning*, all damages and costs which may accrue by reason of the injunction in this action.

[Signed,]

EDWIN WINSHIP.

ELI ARMANTROUT.

JAMES GASTER.

WILSON SEAWRIGHT."

April 13th, 1861.

"Approved by me: JOHN M. COWAN."

The defendants demurred to the complaint, and assigned as a cause that it did not state facts sufficient to constitute a cause of action, but the court overruled the demurrer, to which the defendants excepted. They then answered by a general denial. There was a trial by jury, and a finding for the plaintiff for \$120. A motion for a new trial, by the defendants, was overruled by the court, and judgment rendered on the finding of the jury. The defendants excepted, and appeal to this court.

Several errors are assigned, and urged as causes for the reversal of the judgment of the lower court. We will notice them in the order in which they are presented.

1. "The court erred in overruling the defendants' demurrer to the complaint."

The complaint, in substance, alleges that on the 13th of *April, 1861*, the defendant *Winship* filed and presented a complaint before *John M. Cowan*, Judge of the *Clinton Circuit Court*, setting forth, among other things, that he and one *John P. Crothers* were joint tenants of certain real estate, (which is described,); that at the *June term, 1860*, of the *Clinton Common Pleas Court*, *Crothers* commenced a suit for the partition of said land; that partition was made by commissioners appointed by the court, and a report thereof made, and confirmed by the court; that he,

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Winship, had appealed said case to the Supreme Court. That by said partition there were set apart to him only 26 35-100 acres, while to *Crothers* were given 53 35-100 acres, when, in fact, he, (*Winship*), was entitled to one-half of the whole tract. That *Clendenning*, the plaintiff, had, without right, entered upon his (*Winship's*) half of said land, and was trespassing thereon by felling timber and committing other wastes; and thereupon prayed for an injunction, and an order restraining the plaintiff, *Clendenning*, from the further possession or interference with said half of said land. Whereupon said judge granted an order restraining the plaintiff from entering upon said premises, or exercising ownership over the same in any manner whatever. And that, "at the succeeding term of said Circuit Court, the plaintiff was enjoined from entering upon said premises until the determination of the said partition case in the Supreme Court." The complaint further avers that at the time of the application for said injunction, the said defendant *Winship*, together with the other defendants herein, entered into the written obligation upon which this suit is brought, a copy of which is set out in the complaint, and also filed therewith. It also alleges that the plaintiff is the owner in fee of the land so set apart to said *Crothers* on partition, and was entitled to the possession thereof previous to the time of granting said injunction, and that said partition cause had been determined in the Supreme Court against *Winship*, and the report of said commissioners, and the judgment thereon, affirmed; and that by reason of said injunction and restraining order, the plaintiff had been deprived of the use of said premises for three years. That *Winship*, having possession of the land, had appropriated a large amount of grain which the plaintiff had sown thereon, and had consumed a large amount of timber, rails, and other articles of value appertaining to said land, and prays judgment for \$500.

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It is objected to the complaint that the restraining order first granted by the judge, was granted at a time when the said *Clinton* Circuit Court was, by law, authorized to be in session, and that, in the absence of any direct averment to the contrary, it must be presumed the court was in session, and that, in such case, the *court*, and not the judge, as in vacation, should grant the restraining order. There is nothing in the objection. The inference to be drawn from the averment is that the court was not in session at the time the order is alleged to have been first granted; besides, it is averred that "at the succeeding term of said Circuit Court the plaintiff was enjoined," &c. We do not decide that the bond would have been void, if the court had been in session at the time the restraining order was granted by the judge, and the bond executed. The question is not in the record, and we therefore do not express any opinion in reference to it.

It is also insisted that the bond is void on its face, for the reason that no venue is stated, and it does not show that it has any connection with the injunction proceedings. This objection is also untenable. As a venue, the state and county are stated in the bond; the names of the parties to the suit are the same as in the injunction case, and it is directly averred in the complaint that it was executed in that connection.

The complaint, we think, clearly shows a good cause of action, and the demurrer was, therefore, correctly overruled. Other objections to the complaint are presented, but they are quite too technical to require special notice.

2. On the trial of the cause before the jury, the plaintiff, over the objection of the defendants, was permitted to read in evidence what purported to be the original bond sued on. The grounds of objection are stated thus in the bill of exceptions: "That it did not bear the title of any court, and that it was indefinite, uncertain, and bad on its face." The execution of the bond was admitted by the pleadings; it formed a proper part of the plaintiff's evidence; it

corresponded with the copy filed with the complaint, and the court did right in permitting it to be read to the jury.

3. At the proper time, the plaintiff offered in evidence the record from the recorder's office of the deed from *Crothers* to him for the land referred to in the complaint, to which the defendants objected, "because the absence of the original was not sufficiently accounted for, and because no copy thereof had been filed with the complaint." But the court overruled the objection, and permitted the record of the deed to be read in evidence, which is also assigned for error.

The deed was duly acknowledged by the grantor, and a proper certificate of the acknowledgment indorsed on it, under the hand and seal of a notary public in *Ohio*, and the certificate recorded with the deed. Under these circumstances, it was properly admitted in evidence without accounting for the absence of the original. *Lyon et al. v. Perry et al.*, 14 Ind. 515; 2. G. & H., § 288, p. 188. The deed was not the foundation of the action, and it was not necessary to file a copy of it with the complaint. Another objection is argued by the appellant in his brief, but as it was not made at the proper time in the court below, it will not be noticed here.

4. The court below permitted the plaintiff, over the defendants' objection, to read in evidence the proceedings and judgment in the *Clinton* Circuit Court, in the injunction case of *Winship* against the plaintiff, in which the bond sued on was executed. The only objection made by the defendants at the time the evidence was offered, as stated in the bill of exceptions, was that "no copy thereof had been filed with the complaint." This suit is founded on the bond given by *Winship* to procure the injunction, and not on the proceedings and judgment in that case, and it was not necessary, therefore, that a copy of such proceedings and judgment should be filed with the complaint. But if it were otherwise, the failure to file such copy might

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render the complaint defective, but it would not furnish a valid objection to the giving of the record in evidence on the trial.

5. The next question presented arises upon instructions given and refused.

The court instructed the jury that, "A possessory right would entitle the plaintiff to recover for being kept out of possession," to which the defendants excepted, and asked the court to instruct the jury as follows:

"1. A mere possessory right to the premises in question is not, of itself, sufficient to entitle the plaintiff to recover."

"2. If the plaintiff had no other right to the possession than that conferred by a title bond, he has no right to recover."

These instructions were refused by the court, to which refusal the defendants also excepted.

The evidence in the case is all in the record by a bill of exceptions, from which it appears that the plaintiff purchased the land of *Crothers* before the execution of the bond sued on, and was in possession and held the same by title bond from *Crothers*. The deed to him was executed and acknowledged on the 20th of *March*, 1861. He had paid part of the purchase money, and the deed was placed in the hands of a third person as an *escrow*, to be delivered when he paid the residue of the purchase money. It was delivered to the plaintiff on the 15th of *February*, 1864, after the commencement of this suit.

These facts show that the plaintiff, under his purchase, had the right of possession, at least as against *Winship*, and this possessory right was sufficient to enable the plaintiff to maintain this action. *Case et al. v. Weber et al.*, 2 Ind. 108; *Carney et al. v. Reed*, 11 Ind. 417. The instruction given by the court was correct, and those asked by the defendants were correctly refused.

The following instruction asked by the defendants was also refused by the court:

"If *Winship*, during the pendency of the injunction, cut timber on the land wrongfully, the damages resulting therefrom, if any, can be recovered by the then holder of the freehold, and they are no part of the measure of damages in this case."

We have already seen that the plaintiff's possessory right was sufficient to enable him to maintain the action, and recover in damages for any injury to that possession resulting from the injunction. But he had more than a mere right of possession; he held an equitable interest in the land itself, and everything connected with it, coupled with the right of possession, of which he was deprived by the injunction, and any injury to the possession, or to the land itself, resulted in an injury or loss to him, and any such injury was covered by the bond. There was no error in refusing the instruction.

Another instruction asked by the defendant and refused by the court, is as follows:

"5. If the partition suit was dismissed by the Supreme Court, it was no longer pending, and on the subsequent reinstatement of the appeal, it stood on the same ground as a new appeal, and could not perpetuate this injunction without a new order from the Circuit Court. The plaintiff, therefore, could not recover damages for any time after the dismissal of the suit in the Supreme Court, if entitled to damages at all."

The same question is again raised and discussed on a motion for a new trial, on the ground that the damages are excessive.

During the progress of the trial, it was admitted that "the partition suit was dismissed in the Supreme Court on the 30th day of *July*, 1861, and that the oats were sown during the interim between the dismissal and the renewal of the appeal," so states the bill of exceptions.

It will be observed that this statement is somewhat indefinite as to how the appeal in the partition suit

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was reinstated, or renewed, in this court after it was dismissed. No other evidence was given in reference to it. If, as the instruction seems pretty clearly to imply, the dismissal was set aside and the cause reinstated on the docket, then the appeal was continued by such reinstatement, and, in effect, the same appeal was pending until the cause in this court was finally disposed of by an affirmance. By the record of that affirmance, given in evidence by the plaintiff, it is shown that the case was affirmed in this court on the 10th of *June*, 1863, and the opinion certified to the court below on the 10th of *August* following.

The instruction asked, we think, was correctly refused, because if, as it states, "the appeal was reinstated," then it was the same original appeal; the dismissal was vacated, and, in that case, it is clear that the injunction continued operative. The terms of the final injunction are that the defendant be enjoined and restrained from entering upon, or interfering, in any manner, with the land, &c., "during the pendency of the partition case," &c., "appealed from the *Clinton Common Pleas* to the Supreme Court." *Winship* claimed that the injunction continued operative after the appeal was reinstated or renewed in this court, and held the possession of the land under that claim until the case was finally affirmed. The plaintiff was thus kept out of possession, and lost the use and profits of the land, in effect, for the period of three years, for which, we think, under the circumstances, he is entitled to recover. Under this view of the case, the evidence clearly justified the finding of the jury, and the damages below are not excessive.

It is proper to note that, in this connection, the court below charged the jury, "that if the plaintiff has a right to recover in this action, it can only be for damages necessarily incident to an obedience on his part to the injunction." The case seems to have been fairly tried in the court below, and we see nothing in the record justifying its reversal. The judgment must, therefore, be affirmed.

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The judgment is affirmed, with 5 per cent. damages and costs.

J. N. Sims, for appellants.

L. McClurg, for appellee.

FITZGERALD v. THE ADAMS EXPRESS COMPANY.

COMMON CARRIER.—MONEY PACKAGE.—A common carrier is not bound to receive money for transportation, unless it is properly secured and addressed; nor will his refusal to count the money, at the request of the consignor, create any presumption against him as to the amount contained in the package.

SAME.—Where a package of money, in a sealed envelope, is received by a common carrier for transportation, and a receipt is given, reciting that the package is "said to contain" a given amount, the recital is not *prima facie* evidence that the package did, in fact, contain the amount named.

APPEAL from the *Jefferson* Common Pleas.

RAY, J.—Complaint for a failure to deliver to the consignee of the plaintiff \$100. The defendant is charged with having received the same as a common carrier. Answer, denial. Trial by jury, and finding for defendant.

Exceptions were taken to instructions of the judge before whom the cause was tried, and to the overruling of the motion for a new trial, and it is insisted that the finding of the jury is not supported by the evidence. The evidence introduced by the plaintiff was that he took to the office of the defendant, in the city of *Madison*, \$1,182 15 in currency, and requested *Burke*, the agent of the defendant, to count it, saying, "here is a \$1,000 bill," holding the same in his hand, "and you can count the rest." The agent replied, "no, we don't count money here." The money was placed in an envelope, the plaintiff could not recollect whether by himself or by *Burke*, and the envelope was

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closed by wetting the gum upon it. The package was addressed by *Burke*. The envelope was introduced in evidence, with the wax seals and stamp of the company upon it. The plaintiff also introduced evidence to show that when the package was received in *New York City* by the consignees, it was by them opened at one end, and the money taken out and counted, and the package found to contain only \$1,082 15.

The receipt given by the company contained these words: "Received of *Wm. A. Fitzgerald* one package, sealed, and said to contain eleven hundred and eighty-two and 15-100 dollars, addressed," &c.

The evidence introduced by the defendant was that of *Burke*, the agent, who stated that he declined to count the money because it was against the rules of the company. That the plaintiff placed the money in the envelope, and inclosed it by wetting the mucilage and closing down the envelope; that he, *Burke*, took the package, sealed up as it was with the gum, and directed it as *Mr. Fitzgerald* requested, and does not know what amount of money was in the package. *Burke* placed one wax seal upon the envelope before the plaintiff left the office, and had all the seals on before he had gone fifty steps away. The package was placed in the iron safe, which was locked, and the only key kept in the possession of the agent, and the money sent in the morning, sealed up in a bag with wax seals, and locked in an iron safe. The wax was impressed with the seal of the office at *Madison*. The packages sent from *Madison* were checked off in *Cincinnati*, and resealed in a bag, and placed in a safe, and sent to *New York* in care of an agent. One duplicate key was in *Cincinnati*, and one in *New York*. The agent who accompanied the package had no key to the safe in his charge. Upon cross-examination, the agent stated that he "had the chance to count the money, if he wished, but that they did not count money, as it would make the defendant liable."

The plaintiff requested the court to instruct the jury as follows :

"A written receipt, or bill of lading, given by the agent of the company, stating that the company had received from the plaintiff 'one package, sealed, and said to contain \$1,182 15, addressed to *Andrews, Giles, Sanford & Co.*, 70 & 72 *Franklin Street*, New York, to be forwarded,' is *prima facie* evidence that the plaintiff did deliver to the defendant such package, (containing said amount of money,) addressed as aforesaid; and if you believe from the evidence that said package was delivered to such agent of the defendant, at the time alleged, and was not sealed, but was open, and that the plaintiff requested said agent to count said money, and see that there was the sum of \$1,182 15 therein, but that said agent then and there refused to count said money, but sealed up the package without counting it, such a state of facts may be considered by you as evidence tending to show that said amount of money was in the package, (and the burden would thereby be thrown on the defendant to show by a preponderance of evidence, and to your satisfaction, that said sum of money was not in said package when the same was delivered to said agent.)"

The court gave the instruction, except the portion included in brackets. The last part of the instruction was correctly refused, as it required the defendant to show to the *satisfaction* of the jury that the sum of money was not delivered to the agent. This would permit the plaintiff to recover upon *prima facie* evidence, unless the defendant could not only rebut a presumption, but establish his defense to the absolute satisfaction of the jury. The plaintiff is not entitled to the benefit of a doubt created by the evidence.

The court gave these instructions to the jury :

"1. If the jury find from the evidence, that the company delivered the package to the consignees intact, as received

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by said company, the company is not liable further as a common carrier.

"2. The plaintiff charges that on the — day of *October*, 1868, he delivered to the defendant, in the city of *Madison*, *Indiana*, a package of money, containing \$1,182 15, which the defendant, as a common carrier, received and agreed to deliver to *Andrews, Giles, Sanford & Co.*, at 70 and 72 *Franklin* street, *New York*, and that defendant did not deliver said package as stipulated, containing \$1,182 15, but only delivered \$1,082 15. The defendant takes issue upon these averments, and, upon this issue, the burden of proof rests upon the plaintiff to show, by a preponderance of evidence, that he did deliver to the defendant a package of money containing \$1,182 15, as charged in his complaint. If this fact is established to your satisfaction, the burden of proof is upon the defendant to show that the package containing \$1,182 15 was delivered as stipulated.

"3. The receipt given by the agent of the defendant for the package of money when it was delivered has been offered in evidence, and there is a difference of opinion between the opposing counsel as to the construction to be given to that receipt. The counsel for the plaintiff insisting that the receipt is, *prima facie*, an admission that the defendant received from the plaintiff \$1,182 15, and devolves upon defendant the burden of proof to show that that amount was not received. We think, gentlemen, that the receipt should be interpreted like any other contract between parties, and that the language used should be given its ordinary construction; and the language of the receipt does not, in our opinion, amount to an admission on the part of the defendant that the package contained \$1,182 15.

"4. There is testimony tending to show that it is a rule of the *Adams Express Company* (the defendant) that the agents of the company shall not count money packages; but receipt for the package as sealed, and said to contain a specified sum.

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"We think a company may organize as a common carrier, and establish such a rule, and it will then be optional with the public to patronize it, or not."

The plaintiff excepted to the giving of these charges.

It is insisted by the appellant that the use of the word "intact," in the charge set out second in order, was improper, as the primary meaning of the word is "untouched." If the jury so understood the word used, it would require the company to deliver the package "untouched," as it was received, to the consignee. We are at a loss to discover how so strict a rule, applied to the defendant, could injure the plaintiff on the trial. The objection, however, has no merit, as the jury had, doubtless, sufficient intelligence to arrive at the proper meaning of the word from the context.

The only questions presented by the instructions, then, are whether the court properly refused to instruct the jury that the words, "said to contain," in the receipt, were *prima facie* evidence of the amount actually inclosed in the package; and whether the refusal of the agent to count the money, when requested, threw the burden of the issue upon the defendant. The rule is well settled, that before any inference can be drawn from the passiveness or silence of a party, the circumstances must be such as not only afforded him an opportunity to act or speak, but such as would properly and naturally call for some action or reply. 1 Greenlf. Ev., § 197. Clearly, in this case, the agent did not intend to admit the amount stated by the plaintiff to be the correct sum, as he placed his refusal expressly upon the ground that his counting the money would, in his opinion, render the defendant liable. Was it then the duty of the agent to count the money, and thus furnish to the plaintiff an admission by the defendant's agent of the contents of the package about to be delivered to the company for transportation to New York? The money was to be conveyed in a sealed package. The package was received

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sealed up, according to the testimony of the agent of the defendant. The company would only receive it when thus properly enveloped and secured. Declining to count the money, or receive it before properly secured, the agent receipted for the package, and, as the plaintiff well knew, with no other knowledge beyond his statement of the exact amount inclosed. It was not the duty of the company, as a common carrier, to receive money for transportation, unless the same was properly secured and addressed. How then can it be insisted, that before the package is in such condition that the company was bound, as a carrier, to receive it, the agent must inspect it, while in the possession of the shipper? In our opinion, the company was under no obligation to furnish to the plaintiff evidence of the contents of a package received under such circumstances. The agent gave a receipt for the package, with its marks, and sealed and impressed it with the office marks peculiar to the office at *Madison*. The evidence given in the receipt is sufficient to enable the plaintiff to identify the package, and that is all that can be required of the carrier. A receipt for the article is sufficient, and the plaintiff must be able to establish the value, and cannot require the carrier to furnish such evidence for him. A different rule would require the company to become not only a carrier, but an appraiser of the value of all articles about to be intrusted to them for transportation.

The carrier, then, being under no obligation to count the money, no presumption can be created against him by his refusal to do so at the request of the plaintiff.

Did the receipt, then, create such a presumption against the defendant? The recital in the receipt, if it had absolutely admitted the sum claimed to have been contained in the envelope, would only have been *prima facie* evidence of the amount, and could have been contradicted by parol evidence. 1 Greenlf. Ev., § 805. In the case under consideration, the evidence of the plaintiff, that the agent declared

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that they did not count money there, and that the amount was stated in the receipt from the declarations of the plaintiff alone, would have prevented any such presumption arising from the instrument.

But the language of the receipt is not *prima facie* evidence of the amount of money contained in the package. "Received of *Wm. A. Fitzgerald* one package, *sealed*, and said to contain \$1,182 15," cannot be held to be an admission that the agent knew the contents of the package, for the statement that he received it "sealed," rebuts any implication of knowledge on his part of the contents, and the words "said to contain \$1,182 15," refer, therefore, clearly to the statement of the person who delivered the sealed package to the agent.

We regard the instructions given by the court as having placed the plaintiff's case before the jury in the most favorable light, and we cannot disturb the finding of the jury, rendered as it was, with the sealed envelope before them, with the impressions on the wax of the seal of the *Madison* office, and open only at the end, with the testimony of the plaintiff's witness that he had so opened it, and taken out the contents.

We are not clear that the finding of the jury is not in accordance with the weight of the evidence; we are satisfied that it is not without evidence to support it.

The judgment is affirmed, with costs.

H. W. Harrington and *C. A. Korbly*, for appellant.

J. E. McDonald, *A. L. Roache* and *D. Sheeks*, for appellee.

Smith and Others v. Alexander and Others.

SMITH and Others v. ALEXANDER and Others

PRACTICE.—A question presented for the first time in the Supreme Court will not be considered.

SAME.—HIGHWAYS.—Where a petition for the location of a highway has been received and acted upon by the board of commissioners, without objection to the sufficiency of the notice, it is too late, after the case has been appealed, to object to the notice.

SAME.—If the public utility of a proposed highway is not put in issue by the remonstrance, but a claim for damages only is presented, the utility of the highway is admitted, and the reviewers have only to report upon the claim for damages.

SAME.—When a person, not a party to the original remonstrance, is permitted in the Circuit Court to become a party, he occupies the same relation to the proceedings as the original remonstrants.

APPEAL from the *Marion* Circuit Court.

ELLIOTT, C. J.—*William Alexander* and twenty-nine others, citizens and freeholders of *Marion* county, filed a petition before the board of commissioners of said county, for the location of a public highway. Proof of notice of the petition, by publication in a weekly newspaper published in the county, was made, and also that at least six of the petitioners were freeholders who resided in the immediate neighborhood of the road petitioned for. At the time the petition was filed, *John W. Hamilton* appeared as the attorney of *Henry Smith* and others, and filed written objections to the reception of the petition, on the grounds that a previous application had been made for the same proposed highway and defeated, and that the petition is not signed by any of the owners of the lands on the line of the proposed highway. The objections were overruled, and viewers were appointed, who reported in favor of the proposed highway, and that it would be of "general utility."

Smith and others, over whose lands the proposed highway, if located, would pass, then appeared and filed their written objections, or remonstrance, against the same, on account of the damages it would cause them, the amount

of which, to each, is stated. Reviewers were thereupon appointed, and a final report was made, finding the proposed highway to be of public utility, and assessing damages in favor of a part of the objectors, and finding that the others would not be injured by the location of the highway.

A final order was thereupon made, locating and establishing the highway, and ordering it to be opened thirty feet in width.

The remonstrants thereupon appealed to the Circuit Court.

David G. Cole, over whose lands the highway was proposed to be located, appeared in the Circuit Court, and, on his petition filed, claiming damages, was permitted to join in the remonstrance.

The case was then submitted to a jury, who found that the proposed highway was of public utility, and assessed damages in favor of a part of the claimants.

Motions for a new trial and in arrest of judgment were made and overruled, and a final judgment rendered locating the highway. The remonstrants appeal.

The first objection presented, upon which a reversal is claimed, is that the description of the highway and its location, both in the reports of the viewers and the final order of the court, is defective for want of sufficient certainty. The description as given in the petition is followed in all the subsequent proceedings, and is as follows, viz: "Beginning at the line dividing sections eight and nine, in township fifteen north, of range four east, at a point where the *Indianapolis & Bean Creek Gravel Road* crosses said line, thence running north on said line," &c., "until said proposed highway will intersect the *Indianapolis & Pendleton Gravel Road*; varying, however, from said line at the crossing of the *Central Railway* track, far enough to the east to avoid the culvert under said railway track, and to place said highway upon good ground for a road. Said road will be about three miles in length."

The statute requires the viewers, in their report, to give

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a full description of the location by routes and bounds, and by its course and distance. This road being located on a section line, already definitely ascertained and marked, no further marking was necessary, even to a strict compliance with the statute, except, perhaps, at the point where it varies from that line far enough to avoid the culvert under the *Central Railway* track. The course and distance are stated.

We think it but reasonable to infer that the viewers marked the location, at the point of deviation from the section line, though their report is silent upon that subject. At any rate, we do not think the location is void for uncertainty. But this question is not properly before us, as it is raised for the first time in the appellants' brief. It is not assigned as a cause for a new trial, nor in arrest of judgment, nor is it assigned as error.

The only remaining objection is that the Circuit Court erred in refusing to dismiss the proceedings, on the motion of *Cole*, for the want of sufficient notice of the filing of the original petition before the board of commissioners. We do not decide that the notice was insufficient, nor discuss the question at all, for the reason that the objection, if otherwise valid, was not made at the proper time.

The record shows that at the time the petition was presented, *Smith*, and others of the appellants, appeared and objected to the proceedings on other grounds, but made no objection to the sufficiency of the notice; and when the first viewers reported in favor of the highway, all the remonstrants, except *Cole*, appeared and filed their claims for damages. They did not object to the sufficiency of the notice, nor that the proposed highway was not of public utility; they simply claimed damages because of its location on their lands. We deem it proper here to say that, under the statute, it is clear that the reviewers had nothing to do with the question of the public utility of the highway; that fact was, in effect,

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admitted by the remonstrants failing to deny it, and claiming damages.

The only question, therefore, submitted to the reviewers, was the amount of damages, if any, the remonstrants would sustain by reason of the location of the road through their lands. This, in effect, was the issue, and was the only question to be tried, on appeal, in the Circuit Court. The remonstrants might also have put in issue the public utility of the highway, but they did not, and it was therefore admitted. *Cole* was not a party to the remonstrance when it was filed, but was permitted to become a party to it in the Circuit Court, and to file his claim for damages, which he did. He then occupied the same relation to the proceedings that the other claimants of damages did, and could not then object to the notice. See *Daggy et al. v. Coats et al.*, 19 Ind. 259.

The judgment below is affirmed, with costs.

D. McDonald, A. G. Porter and W. P. Fishback, for appellants.

H. C. Newcomb, J. Tarkington and R. B. Duncan, for appellees.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY v.
THE NORWICH SAVING SOCIETY.

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CORPORATIONS.—BONDS.—The *Martinsville & Franklin Railroad Company* issued certain bonds, payable to the order of the *Madison & Indianapolis Railroad Company*, for the purpose of borrowing money to complete the road of the former company. The bonds were delivered to the *Madison Company*, and were indorsed and guaranteed by that company, and sent to its agent at *New York* for sale. The agent, in a circular offering the bonds for sale, represented that they were owned by the *Madison Company*. Suit by the holders of the bonds against the *Madison & Indianapolis Railroad Company* upon its guaranty.

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Held, that it is within the corporate powers of the *Madison & Indianapolis Railroad Company* to sell and guarantee bonds held by it in the usual course of its business.

Held, also, that as the contract of guaranty upon the bonds was, upon its face, such a contract as the company had power to make, the fact that the guaranty was, in this case, made for a purpose not authorized by the charter, (as for the accommodation of another road,) could not affect the right of a *bona fide* holder, without notice, to recover upon it.

Held, also, that the general agent of a corporation, clothed with certain powers by the charter, or the lawful act of the corporation, may use these powers for an unauthorized, or even a prohibited, purpose, in his dealings with an innocent third party, and yet the corporation be held liable for his acts.

APPEAL from the *Marion* Common Pleas.

GREGORY, J.—Suit by the appellee against the appellant, on the guaranty of the latter of the payment of certain bonds executed by the *Martinsville & Franklin Railroad Company*, payable to the *Madison & Indianapolis Railroad Company*, or assigns, at the *Merchants' Bank*, in the city of *New York*, and by the latter railway company assigned to *Winslow, Lanier & Co.* The bonds were put upon the market, in the city of *New York*, by *Winslow, Lanier & Co.*, the agents of the payee, by a circular, in which it was represented that the appellant was the owner of the bonds; that the same had been issued to her by the maker, to pay a certain indebtedness of the latter to the former. The appellee is the holder, in good faith, of the bonds and guaranty sued on.

William N. Jackson, on the trial, testified that "he was the secretary of the appellant on the 1st of *May*, 1852; was such secretary from 1844 to 1853. That the appellant had agreed to indorse the bonds of the *Martinsville Company*; that the first order was for \$25,000, but was increased to \$30,000; that the bonds were for the purpose of preparing the *Martinsville Road* for the iron. The bonds were not issued to, nor indorsed by, the appellant for any indebtedness due from the *Martinsville Company*; there was no such indebtedness; nor in consideration of iron sold by

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the *Madison Road* to the *Martinsville Road*, but to give them credit, that the latter might raise money upon them to prepare the road for the iron. The inducement to the *Madison Road* to indorse the bonds was to get business from the *Martinsville Road* when completed; this business was expected by the intersection at *Franklin*. *Winslow, Lanier & Co.*, were stockholders in the *Madison Company*, and one of them was a director in the road; thinks it was *Winslow*. When the bonds were sold, the *Madison Company* was notified, and the money passed through the office of that road, and *Mr. Parks* received it as the president of the *Martinsville Company*. The bonds sold for \$85 on the \$100. *Parks*, as president of the *Martinsville Company*, borrowed money of the *Madison Company* in advance, which was repaid out of the proceeds of the sale of the bonds. The bonds sold for about \$25,000, and the whole proceeds were paid over to *Parks*, part before, and part after the sale of the bonds. No interest was paid to the *Madison Company* on advances. The following advances were made in 1850: \$5,000, \$3,000, \$3,000, \$2,500 and \$2,000. This was in the months of *May, June, August* and *October*, 1850, and in *January*, 1851. Between that time and *September*, 1853, the *Martinsville Company* received \$2,500, \$1,000, \$1,376, with smaller sums making up the amount of sales of the bonds. Thinks that no stock of the *Martinsville Company* was transferred to the *Madison Company*. He ceased to be secretary of the *Madison Company* about *June 1st*, 1853, and previous to his leaving he thinks no payment in money or bonds was made by the *Martinsville Company* to the *Madison Company*, for iron furnished by the latter to the former. The first shipment that was received upon the *Martinsville Road* was in *December*, 1853, and the iron had been laid in the summer of 1853.

"*S. S. Gillett* was treasurer of the *Madison Road*. The agreement for running the *Martinsville Road* by the *Madison*

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Road was made after the sale of the bonds, and was in 1853. The records of the appellant are at *Madison*.

"His impression is that *Winslow, Lanier & Co.*, notified the *Madison Company* as the sales of the bonds were made, and said company then paid to the *Martinsville Company* the amount, and sometimes paid in advance. The *Madison Company* transacted its business in *New York* through *Winslow, Lanier & Co.*, and had large business transactions with them. The indorsement of the bonds by the *Madison Company* was printed with the bonds, but the signature of *Mr. Brough* was written, and witness' signature as secretary was written; the date was also written, and the seal was impressed.

"The *Madison Company* was selling its own bonds at *Winslow, Lanier & Co.*'s about the same time; and previous to 1852, they had sold for the *Madison Road*, perhaps, \$600,000 of bonds, or perhaps more. In 1852, the *Madison Company* had good credit in *New York*. The *Martinsville Company* was almost unknown in *New York*, and could not have had much credit.

"When he signed the indorsement of the bonds, he handed them to the president or treasurer of the *Madison Company*, but he supposes he handed them to the treasurer, and does not know whether *Mr. Parks* had them or not."

It is contended that the charter of the *Madison Company* did not empower it to make accommodation paper, and that the construction of the *Franklin Road* was a purpose foreign to the objects for which the former company was incorporated, and that therefore the bonds and guaranty were issued without authority by the appellant, and are therefore void, even in the hands of an innocent *bona fide* holder.

The bonds and guaranty were legal on their face. It is within the corporate power of the appellant to sell and guarantee bonds held in the usual course of business. The court below, sitting as a jury, had a right, from the evidence, to find that the *Madison Company* was the holder of the bonds; that it had advanced money

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thereon to the maker, which was to be reimbursed out of the money arising from the sale thereof.

In the case of *Stoney v. The American Life Insurance Company*, 11 Paige's Ch. Rep. 685, it was held by Chancellor WALWORTH, that "the negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was, in fact, issued for a purpose, and at a place, not authorized by the charter of the company, and in violation of the laws of the state where it was actually issued." In the case of *The Farmers' and Mechanics' Bank v. The Butchers and Drovers' Bank*, 16 New York Rep. 125, SELDEN, J., after citing this and two other cases, says: "I have no hesitation in concurring with these learned judges in the principle thus asserted, and am not aware that a contrary opinion has ever been judicially expressed. A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is, upon its face, in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprized, would obviously conflict with the whole policy of the law in regard to negotiable paper."

In the case of *Smead et al. v. The Indianapolis, Pittsburgh & Cleveland Railroad Company*, 11 Ind. 104, this court attempted to draw a distinction between paper executed beyond the power, and that executed within the power of the corporation, but by an abuse of the power in that particular instance. After a careful review of all authorities on the question, it is difficult to sustain such a distinction on any sound principle of law or reason, when applied to commercial paper, legal on its face, and when the

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lack of power must be sought in extrinsic facts. It is clear, where the paper, on its face, shows the want of power, that it will be void in the hands of the assignee, for there cannot be an innocent holder of such paper.

The general principle, we think, fairly deducible from the authorities, is this; the general agent of a corporation, clothed with a certain power by the charter, or the lawful act of the corporation, may use that power for an unauthorized, or even a prohibited, purpose, in his dealings with an innocent third party, and yet render the corporation liable for his acts.

The judgment is affirmed, with 1 per cent. damages, and costs.

A petition for a rehearing having been filed, the following opinion, overruling the petition, was delivered by

FRAZER, J.—In an earnest petition for a rehearing, the appellant insists that the bonds bore evidence upon their face that they were being sold for the benefit of the *Martinsville Company*, and that the *Madison Company* had no interest in them, and was therefore a mere accommodation indorser and guarantor, and that this fact, patent upon the bonds, was notice to every holder. The matter which it is urged was sufficient to give this notice, consists of a certificate by the trustee, *Mr. Lanier*, and an order of the board of directors of the *Martinsville Company*, printed on the face of each bond, to-wit:

CERTIFICATE.

"I, *James F. D. Lanier*, trustee, do hereby certify that the *Martinsville & Franklin Railroad Company* have conveyed to me, by deed bearing date the 28th day of *April*, 1851, their road from *Martinsville* to *Franklin*, about twenty-five miles, with its income and franchises, and all the property, rights and privileges of the company pertaining thereto, in trust for the use and benefit of the holders of their obligations,

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issued and to be issued; that is to say, the sum of \$30,000 dollars on the 1st day of *May*, 1851, and not exceeding the sum of \$50,000, and only so much thereof as may be requisite to be issued, from time to time, after the 1st day of *May*, 1851, as the same may be necessary to make payment for iron purchased for said road. The first class of said bonds to be redeemable *May* 1st, 1861, and the latter class redeemable *November* 1st, 1863, as by reference to said deed of trust, which I have caused to be recorded in the several counties in, or through, which said railroad is located, will more fully and at large appear. I further certify that this bond is one of the obligations issued under said deed.

J. F. D. LANIER, *Trustee*.

New York, May 1st, 1851."

ORDER.

"At a regular meeting of the Board of Directors of the *Martinsville & Franklin Railroad Company*, in the town of *Martinsville*, county of *Morgan*, state of *Indiana*, on *Monday*, the 7th day of *April*, 1851, it was ordered by the board: That the president of the board be, and he is hereby, authorized to effect a loan, or otherwise raise a sufficient sum of money, say \$35,000, to defray the expenses of putting the superstructure on this road, by the sale of the bonds of this company, the principal of the bonds to be made payable in ten years from date, drawing interest at the rate of seven per cent. per annum; and that he be authorized to purchase or procure the iron necessary for the road, on the best possible terms; also, that he be empowered to execute, or cause to be executed, a mortgage on the road, to secure the payment of the price of the iron aforesaid, and the principal and interest of the said bonds; and that he fix the time of paying the principal of the price of the iron at twelve years, and the rate of interest on the price of the same at a rate not to exceed seven per cent. per annum."

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We cannot perceive how all this can fairly be held sufficient to impart to the holder of the bonds notice that the *Madison Company* was but an accommodation guarantor. What does appear by the face of the bonds, taken altogether?

1. That the directors of the *Martinsville Company* authorized the issue of bonds, not exceeding \$35,000, to obtain money to put the superstructure on its road; such bonds to be payable in ten years from date. 2. That these bonds were issued under that authority. 3. That they were payable to the *Madison Company*, or assigns. 4. That the latter company, a year afterward, indorsed them, and guaranteed their payment. Then it otherwise appears that the latter company afterward pretended to own them; had them in its possession; put them on the market, sold them, and received the proceeds. Thus they were put in circulation with not a circumstance appearing on their face, or extrinsically, suggestive of a doubt that the *Madison Company* owned the bonds and was selling them on its own account. We find it difficult to imagine any course of conduct possible to have been pursued, which would have been likely to be more effectual in creating a belief among capitalists that the bonds were owned by that company. By assigning them, the company covenanted that they were its property. It is not graceful to deny this now, after parties have been induced to part with their money in consequence of their reliance upon this fact.

If the bonds had been payable to bearer, then the guaranty would have implied little or nothing as to the fact of ownership by the appellant, and would have had little tendency to mislead as to a fact upon the existence of which the power to make the guaranty depended, and, in that case, the question would have been a different one. Every person taking the bonds in suit was bound, it is true, to take notice of the limits of the power of the corporation which had guaranteed the paper. But whether the bonds in question had been received by the company in the course of its lawful business, or whether the company had no ownership

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or interest in them, was a question of fact, and not of law. To hold that, in this case, the purchaser of the bonds, possessing as they do the attributes of commercial paper, must, at his peril, ascertain these extrinsic facts, would be so utterly at variance with the well settled and just principles of law relating to such paper, and would, if made a precedent, be fraught with such incalculable mischiefs to public and private interests, that we are not disposed to take the step. It is not entirely certain that its evil consequences would not be quite as adverse to the interests of railroad corporations, as to those of the community at large.

The petition for a rehearing is overruled.

T. A. Hendricks and *O. B. Hord*, for appellant.

J. S. Newman, *H. C. Newcomb* and *J. S. Tarkington*, for appellee.

STEWART, Guardian of RINKER, v. RINKER, Guardian of HIATT.

FRAZER, J.—This case has been here before, and is reported in 17 Ind. 264. It was a claim filed against the estate of *Levi Rinker*, by the appellee, as guardian of the children of one *Joseph Hiatt*, who died testate in 1849. The appellee was the widow of *Hiatt*, and, in 1853, married *Rinker*, now also deceased. The claim is for money and property which it is alleged she held in her fiduciary capacity, and which, after her marriage with *Rinker*, came into his possession. *Hiatt*, by his last will, constituted the appellee guardian of his children, and directed that after the payment of his debts, &c., all his estate should remain in her hands, for the support and education of the family,

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until the youngest child should arrive at age, and that an equal division of what remained should then be made among them. But the will also reserved to the widow "all her rights given her by law." No separation was ever made of her portion from that of her children, and by good management the aggregate was greatly increased. It was this property, thus held undivided, which came into the possession of *Rinker*, and for the portion belonging to the *Hiatt* children the claim in contest was filed. The youngest child is not yet of age. There was a judgment against the estate for \$500.

When the case was formerly before this court, some pains were taken to enunciate the principles which ought to govern the court below upon the new trial which was then directed. That court seems to have been guided, upon the last trial, by the opinion then pronounced here. We think, however, for reasons hereafter to be given, that the finding and judgment are too small upon the evidence which was admitted. Some legal questions are very thoroughly discussed by counsel which, it seems to us, do not arise upon the record, and therefore we forego this occasion of expressing an opinion upon them. After the marriage of the appellee with *Rinker*, it is clearly shown that her interests and his were kept separate. He recognized his liability for whatever came into his hands belonging to the *Hiatt* children, at least, assisted his wife in managing their estate, and made payments on account of it. It is clear that she did not give him the property estimated by the court in making the finding, as is argued for the appellant, though it is equally clear that she did give him some property. But the court refused to receive evidence showing items, and amounts of personal goods, being the trust property left the plaintiff by the will of *Hiatt*, delivered by the plaintiff, before her marriage with *Rinker*, to three of the *Hiatt* children who had arrived at age and married. It was proposed thus to prove that each of them had received articles worth \$150, or \$450 in

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the aggregate. It must be taken that these were advances made upon the shares which will be due these children at the time of making distribution among them, when the youngest of the family shall reach full age. Now, if these advances had been made, the share of the widow in the balance would bear a greater proportion to the whole balance than if no such advances had been made, and, consequently, the recovery in the case would have been less, for the claim is only for so much in the possession of *Rinker*, unaccounted for, as the claimant held in her fiduciary capacity.

To make the point so clear that there may be no misapprehension, we will, upon a supposed state of facts, indicate how a right judgment would be reached. Suppose *Hiatt's* whole personal estate, less debts and expenses of settlement, to have been, with the increase and accumulations, \$1,350. The widow's absolute allowance was \$150, to which must be added one-third of the balance, \$450, making the widow's share, \$550. There would remain for the children's share \$800, from which must be deducted the amount advanced before the widow's marriage, \$450, making the balance of the children's share \$350. So that if *Rinker's* estate had received from the claimant \$900 above all payments on account of it, supposing such payments to have been on account of the fiduciary estate and of the widow, in the proportion that the fiduciary estate bore to her share, the judgment should be for \$350; but by excluding the advances from consideration, it would be \$500. But there was, the evidence discloses, \$400 of the property jointly held which the widow gave to *Oliver Rinker*, as particularly described in the opinion of this court in *Rinker v. Rinker*, 20 Ind. 185. This must be chargeable to her individual share of the property, and lessens her proportion of the property which came to *Rinker's* hands to a much greater extent than it would be increased by the advances, the proof of which was rejected. As the court below evidently did not give that effect to it by its finding, it follows that,

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upon the whole case, the judgment is for a trifle less than it ought to have been, if the evidence of the defendant, which was erroneously excluded, had been admitted, and consequently that the case ought not to be reversed on the application of the defendant.

It may aid to prevent future litigation in the matter to express the opinion, in which we are clear, that the judgment in this case will bar any further claim against the estate of *Rinker*, by, or in behalf of, the *Hiatt* children, on account of trust property received by *Rinker*.

The judgment is affirmed, with costs.

W. R. Harrison, for appellant.

Buskirk & Glessner, for appellee.

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COMMON PLEAS COURTS.—DIVORCE.—The Courts of Common Pleas have jurisdiction of suits for divorce.

CODE.—DIVORCE.—The proceeding for divorce is so far special as to allow all the provisions of the divorce act to have their full force, unaffected by the code.

SAME.—JURISDICTION.—The residence of the plaintiff, and not that of the defendant, determines the jurisdiction in suits for divorce. Process may be served in any county in the state, and service by copy is personal service.

SAME.—NEW TRIALS.—Section 99 of the code, which provides for relieving a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and section 856, which provides for granting a new trial within one year, on cause shown, do not apply to decrees for divorce.

ALIMONY.—CUSTODY OF CHILDREN.—The order as to alimony and the custody of children, which is only an incident of the decree for divorce, can be modified or set aside by a proceeding under section 7 of the act of March 4, 1859, (2 G. & H. 849, note.)

APPEAL from the *De Kalb* Common Pleas.

GREGORY, J.—*Charlotte F. Ewing*, on the 6th of January,

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1864, filed her complaint in the court below against the appellant, for divorce, alimony and the custody of her child. The complaint charged that the plaintiff, for more than twenty years last past, had been, and then was, a *bona fide* resident of this state, and then was a resident of the county in which this suit was brought. The alleged causes for divorce were want of affection on the part of the husband, and his failure to make reasonable provision for his family. The summons was issued to the sheriff of *Allen* county, and was by him served on the defendant, by leaving a copy at his usual place of residence, on the day of the filing of the complaint. On the 19th of that month, the defendant was defaulted. The district attorney appeared and resisted the divorce. The court heard the evidence, and found that *all* the allegations of the complaint were true, and decreed a divorce, alimony, and the custody of the child to the wife.

On the 19th of *July* following, the appellant, *William G. Ewing*, filed his complaint for a new trial. On the 19th of *January*, 1865, this complaint was amended. A demurrer to the amended complaint was filed by the appellee, which was sustained, and final judgment for costs rendered thereon. The alleged causes relied on for a new trial were: First, the misconduct of the plaintiff in falsely alleging that she was a resident of the county of *De Kalb*, for the fraudulent purpose of obtaining the decree in the absence, and without the knowledge, of the defendant. Second, that the suit was commenced and the decree rendered during the absence of the defendant from the state, and without any knowledge, actual or otherwise, of its existence and pendency, until the same was determined; that the allegations in the complaint, the commencement of the suit, and the decree, were matters of entire surprise to him, against which, under the circumstances, no ordinary prudence could guard. Third, that the finding of the court was not sustained by the evidence, there being no evidence at all that the plaintiff was, at the commencement of the suit, a

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resident of the county of *De Kalb*; the defendant not knowing until after the rendition of the decree, and the adjournment of the court, that there was no evidence offered on this point. The errors assigned are: first, that the court below had no jurisdiction of the person of the defendant, nor of the plaintiff; second, that the court had no jurisdiction of the subject matter; third, that the court erred in sustaining the demurrer to the plaintiff's (defendant's) complaint for a new trial; fourth, that the court erred in refusing to grant a new trial.

This court, in 1861, in the case of *Herron v. Herron*, 16 Ind. 129, held that the Common Pleas Courts had jurisdiction in divorce cases; and the question is, shall that decision be overruled? Since the decision in that case, a large number of marriages have been dissolved by the Common Pleas Courts. The parties thus divorced, relying upon the validity of these decrees, have intermarried with others, and children have been born to them. Were this an original question, we confess that we should give great weight, in its determination, to the able argument of the learned counsel of the appellant. This, however, is one of the rules which it is more important shall be settled, than how it is settled. For the reasons stated in *Rockhill v. Nelson et al.*, ante, p. 422, we are of opinion that the case of *Herron v. Herron*, supra, ought not now to be overruled. But while we feel bound to adhere to that ruling, we shall not be constrained by the legal deductions which may be drawn therefrom, in the determination of other questions growing out of the act regulating the granting of divorces.

Had the court jurisdiction of the person of the defendant? By section 6 of the divorce act, (2 G. & H. 350,) it is provided that "Divorces may be decreed by the Circuit Courts of this state, on petition filed by any person who, at the time of the filing of such petition, shall have been a *bona fide* resident of the state one year previous to the filing of the same, and a resident of the county at the time of filing such petition, which *bona fide* residence shall be

duly proven by such petitioner to the satisfaction of the court trying the same."

The code, after making provision for actions in which real estate is involved, for certain actions for the recovery of a penalty or forfeiture imposed by statute, for suits against a public officer, and where a corporation, company, or an individual has an office or agency in any county for the transaction of business, provides that "in all other cases, the action shall be commenced in the county where the defendants, or one of them, has his usual place of residence. Where there are several defendants residing in different counties, the action may be brought in any county where either defendant resides, and a separate summons may be issued to any other county where the other defendants may be found; and in cases of non-residents, or persons having no *permanent residence* in the state, actions may be commenced and process served in any county where they may be found." 2 G. & H., § 33, p. 58. It may be contended, with great plausibility, that, under the code, a party served with process in any county other than that in which the suit is commenced, ought to be put to his plea in abatement, that the plaintiff might have an opportunity to show in reply that he had no *permanent residence in the state*, but it is not necessary for us to decide that question now. The learned counsel of the appellant have furnished us a satisfactory reply to the objection that the court below had no jurisdiction of the person of the defendant. The code is entitled "An act to revise, simplify and abridge the rules, practice, pleadings and forms in *civil cases* in the courts of this state; to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity." Appellant's counsel, in their brief, say: "A proceeding for divorce can with no more propriety be called 'a civil case,' within the meaning of the code, than a proceeding for the same purpose in the ecclesiastical courts of *England* could be

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called a civil case. The proceeding for divorce is a special proceeding, in which relief could be adequately administered if every provision of the code were repealed. An examination of the divorce act will at once satisfy any one that the remedy provided is quite independent of the code. By the first section of the code it is enacted 'that the distinction between *actions at law* and *suits in equity*, and the distinct *forms* of all such *actions and suits*, heretofore existing, are abolished, and there shall be in this state, hereafter, but one *form* of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.'

"By the phrase, 'action at law,' as used in this section, all that was meant or intended was the well known common law actions; and the words 'suits in equity,' comprehend and embrace the various equitable proceedings as understood in *England* and in this country, and nothing more. These propositions are too clear to admit of argument or doubt."

But whether counsel are, or are not, correct, it is clear to our minds that the proceeding for divorce is so far special as to allow all the provisions of the divorce act to have their full force and effect, unaffected by the code.

The case of *Herron v. Herron*, *supra*, decides that Common Pleas Courts have concurrent jurisdiction with Circuit Courts in divorce cases; it follows that the proceedings must be alike in both. Then there can be no divorce case unless it is authorized by the act on that subject. The sixth section of that act is as much a rule for the Common Pleas as it is for the Circuit Court. Any other rule of construction would strike out of the divorce act one of its most wholesome provisions, or deprive the Common Pleas Courts of jurisdiction in all cases in which the plaintiff and defendant reside in different counties. Section 10 of the divorce act provides that "the clerk of the court in which such petition is filed shall issue a summons for the defendant to appear and

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answer said petition; which summons shall be *personally served* on said defendant, *if a resident of the state*, either by reading, or leaving a copy at his or her usual place of residence." 2 G. & H. 851. This section, taken in connection with the provisions of section 6, *supra*, shows that the residence of the plaintiff, and not the residence of the defendant, gives jurisdiction; that the process may be served in any county in the state, and that service by copy is *personal* service.

It remains to inquire, did the court below err in sustaining the demurrer to the appellant's complaint for a new trial?

There are two sections of the code authorizing the court, after the term at which the judgment was rendered, to grant new trials, or relieve the party from the judgment. The ninety-ninth section of the code provides that "the court may also, in its discretion, allow a party to file his pleading after the time limited therefor; and, at any time within one year, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceeding."

This court has held, under this section, that a party can not be relieved from a judgment or decree after the expiration of a year. *Woolley v. Woolley*, 12 Ind. 663. We shall not examine the correctness of this ruling as we do not think it necessary in the case in judgment.

The three hundred and fifty-sixth section of the code provides, that "where causes for a new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk, not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term at which the summons is returned executed, and shall be summarily decided by the

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court upon the evidence produced by the parties. But no such application shall be made more than one year after the final judgment was rendered."

It might be enough for us to say that neither of these sections apply, in terms, to divorce cases, and are only applicable to "civil actions" under the code; but the history of our judicial decisions and legislation on this subject will demonstrate that it was not the intention of the legislature to embrace divorce cases in these provisions. *McJunkin v. McJunkin*, 3 Ind. 80, was decided in 1851, and although that seemed to be a hard case, and the decision arrived at was, to say the least, by doubtful construction, looking to the consequences to follow the opening of judgments of divorce, yet the legislature, in 1852, made the ruling in that case a statutory provision. 2 G. & H., § 43, p. 66. The legislature, in 1859, in an act amending the divorce law, provided that "parties against whom a judgment of divorce has been heretofore, or shall be hereafter, rendered, without other notice than publication in a newspaper, may have the same opened at any time so far as relates to the care, support and custody of the children. Parties against whom a judgment of divorce shall hereafter be rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend, so far as the same relates to the allowance of alimony and the disposition of property. Before any judgment shall be opened as above for any cause, the applicant shall file a statement of the causes relied upon, and give such notice thereof as the court, in term time, or the judge thereof in vacation, shall require; and when the cause specified by such applicant relates to alimony and the disposition of property, the applicant shall file an affidavit stating that during the pendency of the action, he or she received no actual notice thereof in time to appear in court at the time of the trial of such action, and object to said judgment, and shall also pay such costs as the court may direct. Any

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property which may have been sold under any such judgment so sought to be opened, and which shall have passed into the hands of a purchaser, or purchasers, in good faith, shall not be affected by any proceeding consequent upon the opening of such judgment: *Provided*, that the dissolution of the marriage contract shall in no case be set aside under the provisions of this act." 2 G. & H., § 7, p. 349. But against this current of decision and legislation, it is said that appeals may be taken to this court in divorce cases, and that the consequences of a reversal would be the same as the opening of the judgment or the granting of a new trial. If it were admitted that this court could, by reversal, set aside a divorce *a vinculo*, it would not follow that the opening of a judgment, or the granting of a new trial, would be attended with the same results. In subsequent marriages there is one innocent person, not a party to the record. All that such a person can know must be learned from the face of the record. If the proceedings are regular, and in a court of competent jurisdiction, may not such person trust them? But if they are irregular, and the time for appeal has not expired, then the party contracting marriage with the divorced person takes the chances of a reversal, with legal notice of the irregularity. In the case of *Parish v. Parish*, 9 Ohio State Reports 534, PECK, J., in delivering the opinion of the court, after quoting the *Ohio* statute, says: "This statutory provision is nothing more than a legislative recognition of the principle of public policy which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the *status* of married persons, by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the *stability* of a decree of a court of competent jurisdiction, have formed a connection with the person who wrongfully, perhaps, procured its promul-

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gation." The *Ohio* case is sustained by the case of *Greene v. Greene*, 2 Gray 361. In the language of Chief Justice SHAW, in the latter case, "consequences are not always conclusive against a rule of positive law; but where it is a question of construction, either of a statute provision, or a rule of common law, the consequences to which any particular construction or application would lead, have a strong bearing upon the question, what the legislature intended, or what is the just extent and qualification of the rule."

In the light of this well-known and familiar rule, we cannot say that the legislature intended to embrace divorce cases in the provisions of sections 99 and 856 of the code.

The orders as to alimony and the custody of the child are but incidents to the decree of divorce, and we know of no rule of law by which that part of the decree can be reached, except that provided for by statute, and the appellant is not within its provisions in his application for a new trial.

The judgment is affirmed, with costs.

J. Morris and *R. Brackenridge*, for appellant.

A. Ellison, for appellee.

RAYMOND and Another v. THOMAS.

APPEAL from the *Wayne* Circuit Court.

RAY, J.—This was an action by *Raymond* and *Cowden* against *Thomas*, for the recovery of rent. Upon the question of the amount of rent due, the appellant, the plaintiff below, testified as follows: "I have always had the supervision and care of the property. I rented the property to *Thomas* in 1857, or as soon as I got possession of it. He has paid me rent to *September* 1st, 1863. Rents prior had been eight and one-third dollars per month. I then notified him that the rent from that time forward would

be ten dollars per month. He has paid me nothing since *September* 1st, 1863. I rented to him at \$100 per year, or \$8 83 per month; no written lease. I rented to him in no particular name. I think I gave the receipt for rent as agent of *Cowden*. Do not know that I have stated my interest or claim in the property to anybody until recently." The evidence of the defendant, *Thomas*, was as follows: "When the property was rented to me, no time was fixed, but I was to have it at \$100 per year as long as I wished to retain it. There was no agreement as to when, or how often, rent should be paid. The rent commenced *August* 1st, 1857. I paid *Raymond* rent to the 1st of *September*, 1863." Receipts for rent were filed, signed by *Raymond*, as agent of *Cowden*. One hundred dollars of rent was paid in sums of eight and one-third dollars. Two hundred and sixteen dollars and sixty cents was paid in larger sums, at various intervals of time. The suit was commenced *July* 19, 1864. This was all the evidence given upon that issue, and we can well understand that the court, upon this evidence, must treat the contract as a lease from year to year, and no time having been fixed for the payment of rent, no action could have been maintained until *August* 1st, 1864, the close of the year. In this view of the evidence, the rulings of the court below upon other issues are immaterial, and are not presented by the record for decision. If the appellants had no claim upon the appellee for rent due, they cannot, by simply asserting such a claim, require us to determine whether their title to the property is perfect.

The judgment below is affirmed, with costs.

G. H. Johnson, L. Develin and N. H. Johnson, for appellants.

J. P. Siddall, for appellee.

Noble v. Morris and Others.

NOBLE v. MORRIS and Others.

HUSBAND AND WIFE.—RESULTING TRUST.—A conveyance having been made in 1835, to husband and wife, the husband, in 1850, executed a deed which, after reciting that the land had been purchased with the money of the wife, purported to convey and limit the descent of the land, on the death of him and his wife, to A, B and C, the children of the wife, to the exclusion of his children by a former marriage. Afterward, the husband and wife joined in conveying separate parcels of the land to A, B and C. *Held*, that the husband held the land only as a trustee for the wife. *Held*, also, that the several conveyances to A, B and C were valid.

APPEAL from the *Marion* Circuit Court.

GREGORY, J.—This was an action for quieting title, brought by the appellees against the appellant, under the statute. 2 G. & H., § 611, p. 284. The complaint seeks to set aside and declare void a paper purporting to have been executed by *B. F. Morris*, on the 29th of *May*, 1850, in his life time, to *Noble* and others, under which *Noble* claimed an interest in the lands of the plaintiffs' below. *Noble* answered, setting up a right under the paper sought to be set aside. The appellees demurred to the answer, and the court sustained the demurrer, and rendered judgment accordingly.

B. F. Morris and his wife held jointly the title to the land, by a deed made to them by *Saunders*. The entire purchase money was paid by the wife. *B. F. Morris* had a set of children by a former marriage, and his wife had one child by a former marriage, who is the appellant, *Noble*; and *Morris* and his wife had two children by the last marriage, *Samuel V.*, one of the appellees, and *Clarissa*, late the wife of *Frederick Yeiser*, one of the appellees, and the mother of the minor appellees of that name, *B. F. Morris* seems to have claimed no interest in the land except as husband of the purchaser, *Margaret Morris*; but as the title was in him and his wife jointly, he executed a paper to the children of *Mrs. Morris*, *Noble*, and *Samuel V.* and

Clarissa Morris, which, in the event of his decease, was to be placed on record for the purpose of limiting the descent of the one-half, the title to which was vested in him. This paper recites, first, the names of the parties, grantor and grantees; secondly, that *John H. Saunders*, on the 12th of *December*, 1835, conveyed to *B. F. Morris* and *M. E. Morris*, his wife, and their heirs, certain lands, describing them. It then proceeds as follows:

"Now this indenture witnesseth, that the said *Bethuel F. Morris*, in consideration that the said tract of land was purchased with money belonging to the said *Margaret E. Morris*, doth convey and limit the descent of said land, with its appurtenances, on the demise of said *B. F.* and *M. E. Morris*, to the said *W. H. L. Noble*, *Samuel V. Morris* and *Clarissa Morris*, hereby confirming unto them the sole heirship in and to the said premises, to the exclusion of all others.

"In witness whereof, the said *Bethuel F. Morris* hath hereunto set his hand and affixed his seal, on the day and year first above written. B. F. MORRIS. [SEAL]"

The instrument was duly acknowledged the same day before a justice of the peace.

On the 16th of *June*, 1857, *B. F. Morris* and wife conveyed to the appellant, by deed in fee, in severalty, a part of the real estate in controversy, and, on the 15th of *December*, conveyed in like manner to *Samuel V. Morris* and *Clarissa M. Yeiser* the residue of the lands in dispute.

The proper construction to be given to the writing of the 29th of *May*, 1850, presents the question for the consideration of this court. We think, under the facts recited in this instrument, that *B. F. Morris* held the land in trust for his wife. We are aware of the rule recognized in the case of *Miller et al. v. Blackburn*, 14 Ind. 62, but it is well settled that the vesting of the separate property of the wife in real estate, in the name of the husband,

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creates a resulting trust in favor of the former. It is true, the recital that the "land was purchased with money belonging to the said *Margaret E. Morris*," is not, in terms, a declaration that the money was the separate property of the wife; but the statement must be taken most strongly against the person making it, and it must be remembered that it is the consideration clause. If the money was not the separate property of the wife, then the possession of it by the wife, after marriage, was the possession of the husband, and nothing remained for him to do to make it his own; and, on this hypothesis, in no legal sense could it have been said, in the language of the writing, that the "land was purchased with money belonging to the said *Margaret Morris*." It is claimed in argument that there could be no resulting trust in favor of the wife, because she consented to the purchase in the name of the husband. This may be true under the present statute, (1 G. & H. §§ 6, 7, 8, p. 651,) but the law in force when the land was purchased, in 1835, must govern this question. R. S. 1831, § 5, pp. 269, 270. In our opinion, the legal effect of the instrument may be rendered in the following words: "I hold a title to real estate which was purchased with money belonging to your mother, and I hold it in trust for her and her heirs, and upon my decease I convey to you my interest as trustee for your mother." On the death of *B. F. Morris*, the heirs of the wife succeeded, under this writing, to the trusteeship held by the husband.

There is a question of estoppel argued, but under our view of the case it does not arise. We do not think the writing of the 29th of *May*, 1850, inconsistent with the subsequent conveyances made by *Morris* and wife to the children of the latter; and, therefore, the court below committed no error in sustaining the demurrer to the defendant's answer.

The judgment is affirmed, with costs.

J. L. Kelcham and *S. E. Perkins*, for appellant.

H. C. Newcomb, *L. Barbour* and *J. T. Jackson*, for appellees.

DEARDORFF and Others v. FORESMAN.*

PRINCIPAL AND SURETY.—If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it shall not be delivered to the obligee, payee or grantee, until some other persons who are agreed upon shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee or grantee has no knowledge of the condition, the delivery will bind the surety.

SAME.—PROMISSORY NOTE.—A executed his promissory note, payable to the order of B, and induced C and D to sign the note as sureties, and re-deliver it to him, A, upon the promise that he would procure other persons, named by them, also to execute said note. In disregard of his promise, A delivered the note to B without procuring the additional sureties agreed upon.

Held, that the delivery to B was absolute, and that the sureties were liable, without regard to the condition.

APPEAL from the *Tippecanoe* Common Pleas.

RAY, J.—Action by the appellee, upon a promissory note, against *Deeds, Deardorff & Lehman*. *Deeds* suffered a default. The other defendants answered in two paragraphs. First, that at the date of the note in suit, *Deeds*, who was insolvent, applied to them to execute the note with him, as his sureties, to the plaintiff, which they refused to do; that he fraudulently represented to them that if they would sign the note, he could procure as co-sureties with them eleven other responsible men, who are named, and that he would not deliver the note to the plaintiff until such signatures were procured. That he failed to procure the names he had promised, but delivered the note to the plaintiff. The note was made payable to the order of the plaintiff. The second paragraph of the answer averred the same facts, and was sworn to. The court below sustained a demurrer to both paragraphs. This is here assigned as error.

The appellants insist that the ruling in the case of

*This case was decided at the November Term, 1865, on a rehearing.

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Pepper v. The State, 22 Ind. 399, requires that the decision of the court below in this case should be reversed. We will consider the case cited only so far as may be necessary to determine its effect upon the question now before us. That case holds that, in an action upon an official bond given to the state, the sureties may defend, either upon the ground that the names of persons appearing to be signed to such bond were forged, and that they executed the bond upon the faith that such signatures were genuine; or that they were induced to execute and deliver the bond to the principal obligor upon the condition, or upon the consideration, or upon the promise, that certain other persons would sign it. It is, however, expressly, said by the judge who delivered the opinion, in overruling the petition for a rehearing, that "we do not say that the same rule that applies to bonds taken pursuant to a statute would apply in private transactions." We are not disposed to extend the effect of that decision to instruments negotiable either by statute or by the law merchant, unless required to do so upon authority or principle. And as the case cited is put rather upon authority than principle, we will consider how far the decisions require us to extend the ruling. Indeed, the opinion given upon overruling the petition for a rehearing rests, except so far as it is based upon the construction of the statute, which construction we are not called upon to review, upon the case of *Bibb v. Reid et al*, 3 Ala. 88, which, it is stated in the opinion, "is directly in point, and, after much reflection, we are prepared to say is, in our judgment, good law." That case cites the law as stated thus, in *Sheppard's Touchstone* 59: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself, as an *escrow*, upon certain conditions, &c., in this case, let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and (in reference to the legal operation of the deed,) he is not bound to perform the condition."

The opinion proceeds: "The rule as above stated in the

Touchstone, has been recognized in the *United States*, in the cases cited from 5 Cranch 351, 8 Mass. 280, and 2 Sumner 487; but it does not appear to obtain at this day in England, as appears by the case of *Johnson et al. v. Baker*, 4 Barn. & Ald. 440, where a composition deed was delivered by a surety who had signed the deed, to a creditor, not to be operative unless all the other creditors executed it. It was held that the deed was delivered as an *escrow*, and that all the creditors not having executed it, the surety was not bound. To the same effect are the cases cited from 3 Wend. 380, 11 Verm. 448, 4 Cranch 219, 2 Harrington 396, 11 Peters 96." The court seem evidently to have misconceived the effect of the decision in the case of *Johnson et al. v. Baker*. The creditors were all parties to the deed of composition, and when the debtor alone had executed it, "the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors." It does not very clearly appear that because an instrument, after being executed by one party, may be delivered to another party to be executed by him, and presented by him to others who are parties to the deed, for their execution, and still not become a deed till executed by all parties, that therefore a deed, perfect in form and execution, may be delivered by the grantor to the grantee as an *escrow*. Nor is the citation of the ruling in *Pauling et al. v. United States*, 4 Cranch, as conflicting with the later case of *Moss v. Riddle*, 5 Cranch, satisfactory, especially as the later case is in conflict with the doctrine asserted by the *Alabama* court. But we will examine that case more carefully in the course of this opinion, only remarking in passing, that whatever the case in 4 Cranch does decide, which we will endeavor to determine in the subsequent review of the case, it certainly does not hold that a delivery may be made by the obligor of the bond to the obligee, as an *escrow*. Nor does the case of *The United States v. Leffler*, 11 Peters, examined hereafter, establish any such doctrine. The case in 3 Wend. 380,

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was where a bond had been executed by nine persons as obligors, "and sent to *New York to be delivered to the plaintiff*, on certain terms and conditions, by which the obligors intended to be indemnified for having become bound for the payment of the money. *The plaintiffs refused to receive the bond* on the terms and conditions proposed. Subsequently, on the 29th of *October, 1824*, five of the obligors, but not those sued in the action, without the knowledge or consent of the defendants in this action, having made a new and different arrangement with the plaintiffs, by which the security relied on by the defendants for their indemnity was yielded up, delivered the bond to the plaintiffs." It was held that the bond was not obligatory upon the four who never entered into the new arrangement with the plaintiffs. The bond was dated *September 21st, 1824*, and the plaintiffs had then notice of the terms upon which the delivery was authorized; they refused to receive it upon those terms, but, on the 29th of *October*, made other terms with five of the parties to the bond. The plaintiffs knew the terms on which the delivery was authorized, and refused to accept upon those terms, and the case simply decides that where the extent of the agent's authority is known to the person who deals with him, that the principal cannot be bound outside of that authority. The case is good law, but not specially relevant to the text.

The case cited from 11 Verm. was where the names of seven sureties appeared upon the face of the bond, and only two of the sureties ever executed the same. The instrument was plainly incomplete until executed by all those whose names appeared as parties.

The decision in *Herdman v. Bratten*, 2 Harrington, *supra*, was that the deed could not be delivered to the party as an *escrow*. This is an express denial of the doctrine it is cited to sustain. So also the case of *The State v. Crisman et al.*, 2 Ind. 126, decides that "a bond cannot be delivered as an *escrow* to the obligee."

In the case of the *Madison, &c., Plank Road Co. v. Stevens*, 10 Ind. 1, Mr. Justice PERKINS states the decision thus: "One co-obligor may, perhaps, deliver a bond to another co-obligor as an *escrow*, but an instrument cannot be so delivered to the obligee or payee, or the agent of either. Such delivery is in law absolute. Peters' U. S. Digest, tit. *Escrow*; *Foley v. Cowgill*, 5 Blackf. 18; *The State v. Chrisman*, 2 Ind. 126; *Wright v. The Shelby, &c., Company*, 16 B. Mon. 5; see 7 Ind. 600; 6 *id.* 183; 9 *id.* 25. And parol evidence cannot be given to vary the legal effect of such delivery, or the terms of the instrument delivered. This has been too often decided to require a citation of authorities to evidence it. *Hiatt et al. v. Simpson*, 8 Ind. 256."

The case of *Foley v. Cowgill* was for a failure to deliver hogs at a certain time and place, according to a written agreement. The defendant answered that the agreement mentioned "was delivered to the plaintiff as an *escrow*, setting out the contingency on which it was to become binding on the defendant, which, it is averred, had never happened." The court ruled that if the instrument "be delivered to the obligee on such contingency, the condition is a nullity, and the delivery absolute."

And yet, without attempting to overrule or question these cases in our own state, the court, in overruling the petition for a rehearing, rests the decision of the case of *Pepper v. The State*, *supra*, except so far as a construction is given to the statute, upon an *Alabama* case in direct conflict with these repeated rulings of our own court. If the doctrine upon which the *Alabama* case proceeds be the law, that a deed or other written instrument may be delivered to the grantee or obligee as an *escrow*, it of course follows that a surety may make such a delivery to his principal. But, in our opinion, such a position is not only without support, but is in conflict with all authority. In the case of *Worrall v. Munn*, 1 Seld. 229, the instrument, an agreement to execute a conveyance, was delivered conditionally to the agent of the party to whom the deed was afterward

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to be executed. The court declares that the law puts the question at rest; that the delivery to the agent was a delivery to his principal. "This was a delivery as an *escrow*; such a delivery can only be made to a stranger. It cannot be made to the party. If made to the party, no matter what may be the form of the words, the delivery is absolute." *Ward v. Lewis*, 4 Pick. 518; *Fairbanks v. Metcalf*, 8 Mass. 230. Mr. Parsons says: "A note, as well as a deed, may be delivered as an *escrow*, and the law of *escrow* is substantially the same in both cases. * * A note cannot be delivered directly to the promisee, to be held by him as an *escrow*." 1 Notes & Bills, 51. *Badcock v. Steadman*, 1 Root (Conn.) R. 87.

We will examine the cases cited in the original opinion in the case of *Pepper v. The State*, *supra*. *Pawling et al. v. The United States*, *supra*, was an action "upon an official bond given by *Ballinger*, as collector of the revenue, and signed and sealed by *Pawling*, *Todd*, *Adair* and *Kennedy*, as his sureties, who pleaded that they delivered the same as an *escrow*, to one *Joseph Ballinger*, to be safely kept, &c., upon condition that if *Simon Ingleman* and *William Patton*, named on the face of the bond, should execute the same as co-sureties, then the bond should be delivered to *James Morrison*, supervisor, on behalf of the *United States*, as their deed, and not otherwise; and that the same never was executed by *Ingleman* and *Patton*." Here the representative of the government had notice, on the face of the instrument, that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors. To have held this delivery of the instrument obligatory upon the parties, when the writing itself proved the execution to be incomplete, would have been in contradiction of its express terms.

In *The United States v. Leffler*, 11 Peters, *supra*, the question under consideration is not discussed either by court or counsel, and the statement of facts does not disclose whether there had ever been any intentional delivery

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of the bond, or, if delivered, by whom such delivery was made; and the only question considered was as to the competency of witnesses to prove a conditional execution. Under what circumstances such a defense was admitted does not appear. If the names of ether parties appeared on the face of the bond, such a defense would have been admissible under the ruling in *Pawling v. The United States*, *supra*. As no question was made by counsel, it was probably controlled by that decision. If it were otherwise, the validity of such a defense was not so clearly established upon authority, that we are authorized to suppose it would have passed unquestioned when presented in the Supreme Court of the *United States* for the first time.

The case cited from 3 Barr (Penn.) 308, was where a party, in executing a bond, expressly stipulated that it should not be delivered up until twelve names were obtained, and the persons who were procuring names to the bond, for the benefit of third parties, agreed that they would not deliver it until it was so executed. It was held that such bond was in their hands as an *escrow*, and until the condition was performed it could not be delivered. So in the case cited from 2 Leigh 157, where the deputy marshal procured a party to sign a forthcoming bond, taken upon execution, and agreed not to file the bond in court until other persons had signed it, it was held that he could not make a valid delivery until the condition was performed. And again, in 2 John. R. 248, it was held that a sheriff might deliver a deed to an attorney to be held as an *escrow*, and only delivered to his client on compliance with the condition. The case of *Sharp v. The United States*, 4 Watts 21, decided that a bond containing in its body two names as sureties, was not binding on one who signed it, unless it was shown that he dispensed with the execution of it by the other. The case in 7 Pick. 91, ruled that "where a bond is signed and sealed, *but not delivered to the obligee*, and it is afterward put into the possession of the obligee by a person who has no authority

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to deliver it, the obligee cannot maintain an action on the instrument."

In the case cited from 7 Ohio 375, the court permitted the party receiving the deed to testify that he only received it for the purpose of enabling him to convey to a third party. That the purpose and consideration of the deed was to enable him, as agent of the grantor, to execute a conveyance to another. We are unable to find the case cited, or any case in 4 John. R. having even as remote relation to the subject under consideration as those we have commented upon. In 34 New Hamp. 460, the rule is stated that "if a deed is placed in the hands of a depository, to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled, but the grantor reserves the right and power of recall at any time, it is not a good delivery."

In 13 Pick. 75, the presumption arising from the fact of a deed having been registered is discussed.

The case cited from 1 Johnson's Cases, decides that "where the grantor held the deed until the consideration should be paid, and died before payment, there was no delivery."

The remaining authorities cited in *Pepper v. The State*, *supra*, refer to the question of agency, the decision proceeding, so far as those authorities are relevant, upon the ground that the obligor in a bond is the agent of the obligee, and the obligee is therefore responsible for all his representations to his sureties. It is unnecessary for us to examine these authorities, as the appellant in this case does not assume the position that a person may, as principal, make a valid contract with himself as agent. As a quotation is made from a note by Judge REDFIELD, in the April No. 1863, of the Amer. Law Reg., p. 846, which rests upon the case of *Pawling v. The United States*, *supra*, we will cite the opinion of the same author in the May No. 1864, of the same magazine, p. 402: "It seems to us upon principle, that where there is nothing upon the face of the paper indicating that other co-sureties were expected to

become parties to the instrument, and no fact is brought to the knowledge of the obligee, before he accepts the instrument, calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee. And, on the other hand, where the surety intrusts the bond to the principal obligor, in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity against all the parties, *he makes such principal his agent to deliver the same to the obligee*, because such is the natural and ordinary course of conducting such transactions; and if the principal, under such circumstances, gives any assurances to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, *the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.*"

In the note to the April No. of the magazine referred to, some authorities are cited as sustaining the application of the doctrine laid down in *Pepper v. The State* to "promissory notes, and other contracts not negotiable, or to negotiable contracts before negotiation." The case cited, *Lloyd v. Howard*, 1 Eng. L. & Eq. R. 227, was where "A, being the payee and holder of a bill of exchange, wrote his name upon it and gave it to B, for the purpose of getting it discounted. B never paid A any money in respect to the bill, *but kept it until it was overdue*, when he delivered it to C without receiving any value for it. Held, that there was no indorsement by A to B." The fact that C received the bill when over due, could give him no right to insist that the apparent indorsement by A to B should be treated as real. The decision in the case of

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Palmer v. Richards, *id.* 529, was where "the drawer of a bill of exchange which had been accepted, wrote his name across the back of the bill, and delivered it to A to get discounted, who, instead thereof, while the bill was running, deposited it with B as security for money advanced to himself, without fraud on the part of B. Held, that this was a valid indorsement of the bill by the drawer to B." In the case of *Leaf v. Gibbs*, 4 Carr & P. 466, the facts show that the plaintiff, who was the payee of the note, knew that when the defendant signed as surety, the agreement was that his mother was also to sign the note with him, and that she afterward refused, and the confidential clerk of the plaintiff stated to the agent of the defendant and his mother, that the arrangement was, in consequence of such refusal incomplete. The court held that the defendant was not liable, unless he waived the execution of the note by his mother. Where the payee receives the instrument with full knowledge of its incomplete condition, in fact, it would, it seems to us, be a fraud to permit him to take advantage of its apparently perfect condition. The decision in the case of *Aude v. Dixon*, 5 L. & Eq. R. 512, also cited, cannot be reconciled with the *American* decisions. Mr. *Parsons* refers to that case as in conflict with the settled law in this country. 1 Bills & Notes 111. The court, to sustain their ruling, declare it to be the law in *England*, that if one signs a negotiable instrument in blank, and delivers it, with authority to fill it up for £100, and it is filled up for £200, and negotiated, the maker will not be liable. Lord MANSFIELD did not thus state the law in *Russell v. Langstaffe*, 2 Doug. 514, and in this country such a doctrine is against all authority, and a decision resting upon it cannot be considered, in our courts, as affording any aid in the determination of legal questions. *Fullerton v. Sturges*, 4 Ohio State R. 529; 1 *Parsons*, *supra*, and authorities cited. The decision in *Aude v. Dixon* proceeds upon the ground that the writing of the greater sum in the instrument would constitute the crime of forgery, and ALDERMAN.

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B., placed the decision in the case upon that ground. This is, perhaps, correct under the *English* statute, but the Supreme Court of *Massachusetts*, in *Putnam v. Sullivan*, 4 Mass. 45, held otherwise, on the ground that the instrument had been delivered upon a trust, intending that something should afterward be written, to which the name should apply as an indorsement.

Judge REDFIELD, however, seems to have regarded the *English* decision in the case of *Swan v. North British, &c. Co.*, 19 Jur. N. S. 102, as conflicting with the view expressed in the note we have quoted from. In that case, "where A was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A, being shares in the defendant's company, and by means of a duplicate key, which he had procured to be made without the knowledge of A, obtained certificates from a box of A's, necessary to perfect the transfers, and also forged the names of the attesting witnesses, Held, in an action against the company for damages, and for a *mandamus* to restore the plaintiff's name to the registry, that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery." In other words, that where the act of the plaintiff, in trusting the agent with the blank forms of transfer, did not enable the agent to commit a fraud upon a third party, but such fraud could only have been consummated by the addition of larceny and forgery, in such case, the plaintiff was not estopped. We admit that we are unable to understand what decision a court could legitimately render in such a case having any relation to the question now under consideration.

There has also been a case decided by the Supreme Court of *Tennessee*, 5 Humphrey 133, which rests for support upon the cases we have already examined in 4 Cranch and 11 Peters Reports, and in our opinion is not sustained by those authorities. Counsel have cited us also

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to the case of *The State v. Bodley*, 7 Blackf. 355. There were in that case no questions decided, or discussed by the court, involving any point now under consideration. Nor could such questions have been presented in that case, as the bond, when delivered, contained the name, in the body of the instrument, of the other party who was to execute it, and the clerk who was to receive the bond had actual notice of its imperfect execution, he being the witness called to prove the fact that the sureties signed on condition that the person whose name was with their's in the body of the bond should also execute it.

Since the decision in the case of *Pepper v. The State*, the New York Court of Appeals has rendered a decision, holding that where a bond is executed by sureties, and delivered to one of their number to keep until also executed by another surety, that the instrument, until so executed, is held as an *escrow*. *The People v. Bostwick*, 32 N. Y. R. 445.

Blackstone defines a delivery as an *escrow*, to be a delivery "to a third person to hold till some conditions be performed on the part of the grantee." See also 4 Kent 454; 1 Coke 36 a.

In Greenleaf's Cruise on Real Property, book 4, p. 29, it is said: "The delivery of a deed may be either *absolute*, that is, to the grantee himself, or to some person for him, or else *conditional*, that is to a third person, to keep it till something is done by the grantee; in which last case it is not delivered as a deed, but as an *escrow*." The instrument is as perfect and complete in form when delivered as an *escrow*, as though it were to be delivered absolutely. An instrument delivered as an *escrow* cannot be withdrawn, but remains in the hands of the holder, to be delivered over to the party for whose benefit it was executed, whenever he performs the conditions upon which the original delivery was made. But so long as the instrument remains in the hands of one of the parties, it has no force whatever.

When a decision is based upon so total a disregard of

the essentials constituting the delivery of an instrument as an *escrow*, it may be well to look closely to the authorities which are cited to sustain this line of ruling.

Those authorities are the ones we have already reviewed, with the additional one of *The State Bank v. Evans*, 3 Green (N. Jersey) 155, which was a case "where the defendant's name was on the bond as one of the sureties, and he proved that the bond was brought to him by one of his co-sureties, and that when he signed it he delivered it to his co-surety, and said to him, "now this bond is not to be delivered up until all the persons named in it have signed it." The court held that the testimony was admissible, and that it overcame the presumption of any legal delivery arising from the mere fact of the obligee having possession of the bond. This is simply another case where the instrument disclosed upon its face that it had not been executed by all the parties. But while citing authorities which, as we have seen, do not sustain the position they are quoted to support, the case of *The People v. Bostwick* entirely overlooks a decision rendered a year earlier by the Supreme Court of *Maine*, in which it was held that "where a surety to a bond signs upon the assurance that the principal will procure two other persons, specified and known to such surety, to sign the bond before he delivers the same, which he fails to do, but this is wholly unknown to the obligee at the time he accepts the bond, such surety is bound to perform the obligation."

The case of *Carr et al. v. Moore*, 2 Ind. 602, was an action of "debt on a bond given to a school commissioner, signed by A, C and P. As to P the bond was a forgery. The bond was delivered to C, the principal, to be signed and sealed, and it was re-delivered to the commissioner by A and C, perfected. The commissioner was ignorant of the forgery, the name of P having been placed upon the bond after its delivery to C for the signatures. Held, that A was liable on the bond." Mr. Justice PERKINS, who delivered the opinion, says: "Had Carr (the principal) induced Atton (the surety) by fraud, to

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executed the bond, still the school commissioner, being ignorant of the fact, could not, we suppose, be affected by it." There was no proof, however, of such fraud, and the expression must therefore be taken, we suppose, rather as the judgment of the writer of the opinion, than as the ruling of the court. But it is certainly entitled to consideration and respect.

The case of *Millett v. Parker et al.* 2 Met. (Ky.) 608, reviews the authorities very fully upon this question, and holds that "a conditional delivery to the principal, by a person who subscribes a paper as a surety, will not make such paper a mere *escrow*. The delivery of the paper, to constitute it an *escrow*, must be made to a third person, and not to a co-obligor; and this whether the instrument be assignable or not."

The case of *The State v. Chrisman et al.* 2 Ind. 126, was an action of debt upon an administrators's bond. Nelson, one of the defendants, filed the following plea, verified by oath: "That the said supposed writing obligatory in the declaration mentioned, was signed by him upon condition that twelve or fifteen other good men signed it, which was not done; and that unless said number of persons did sign it, it was not to be considered his deed." A demurrer was sustained to the answer. The court say: "This plea admits the signature to the bond, and does not deny that the same was delivered to the obligee. When so signed and delivered it became absolute." Upon the face of the bond it appears that the name of Nelson was written next following that of the principal, and was followed by the names of six other sureties. The presumption in law is that the names were signed in the order in which they appear upon the instrument, and as the obligee was the State, and the delivery was the filing of the completed instrument with the clerk, no delivery could have been made by Nelson to the obligee, upon his signing it. So that the decision of the case results, that no delivery by any of his co-obligors could be made to the obligee of the instrument as an

escrow, but the delivery by any of them rendered *Nelsen* liable on the bond.

It was also held, in the case of *Taylor & Co. v. Craig*, 2 J. J. Marshall 449, that a conditional delivery of a promissory note, by a surety in the note to his principal, did not make the instrument an *escrow*, but that the plaintiff had the right to hold the surety responsible without regard to the condition he had imposed upon the principal at the time of the delivery. *The Bank of the Commonwealth v. Curry*, 2 Dana 143, recognizes this as the law. Again, in the case of *Smith v. Moberly*, 10 B. Mon. 266, in deciding a similar question, this language is used: "But a delivery of a writing of this character, under such circumstances, to the principal, does not have the effect of characterizing it as a mere *escrow*; but, on the contrary, the principal should be considered as the agent of the surety, and empowered by him to pass the writing to the person to whom it may be made payable, and his delivery as being sufficient to make it effectual, unless the payee had notice of the special terms upon which it was signed. The implied discretionary authority to use the note, arising out of its possession by the principal, uncontradicted by its terms, or anything apparent on its face, cannot be restricted by any agreement between the payors themselves of which the payee had no notice." The Supreme Court of *Vermont* have also "held that where a note payable to a bank was signed by a principal and one surety, with an agreement on the part of the principal with such surety, that he would procure another surety, which was not done, before he procured the note to be discounted, it will constitute no defense, unless the officers of the bank were cognizant of such agreement." *Passumpsic Bank v. Goss*, 31 Ver. 315; *Dixon v. Dixon*, 8 Ver. 450.

It seems clear, on principle, that a surety cannot make a delivery of a bond to his principal as an *escrow*, upon condition that other names shall be procured before its delivery to the obligee. The very definition of an

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escrow involves the holding of the instrument, complete in form, signed and sealed, prepared for delivery to the obligee, by a third person, who acts as the agent of the obligors and obligee, and who is to make the delivery, not upon some act done by the obligors, but upon the performance of some condition by the obligee. There are but two parties to the instrument, and so long as it is held by the principal it cannot be said to be delivered for any purpose, for it remains still in the hands of the one party, who is only to be bound in any manner upon its delivery to the other. And where there is no delivery of the instrument by the one party executing it, it cannot be said to be held as an *escrow*.

Can a delivery then be made to the principal, as the agent of his sureties, for any other purpose than an unconditional delivery to the obligee?

The interest of the principal is clearly to procure the acceptance of his bond by the obligee, at the earliest moment, and with the least number of sureties. Experience proves, and the law so regards it, that it is a hardship to procure bail, and the interest of the principal is to avoid this hardship. On the other hand, the interest of the sureties is as clear to avoid a delivery until their *pro rata* liability has been reduced by the execution of the bond by other co-sureties.

It is a well established principle of law, that he who has an interest in the doing of a particular act cannot accept an agency in the same matter for others whose interests are adverse to his own. A person will not be permitted to assume an agency for others where the interests of his principal would be in direct conflict with his personal interests. In *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, MORTON, J., says: "It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser, or the agent of the purchaser." Judge STORY, in his work on Agency, § 211, says: "For the like reason,

(that is for the same reason that forbids an agent of the seller himself to become the buyer,) an agent of the seller cannot become an agent of the buyer in the same transaction." And again: § 9 "Yet we are to understand that they cannot, at the same time, take upon themselves incompatible duties and characters. * * A memorandum made and signed by a seller, at the request of the purchaser, will not bind." See 8 Parsons on Cont. p. 11; Smith's Mer. Law 149; *Wright v. Dannah*, 2 Camp. 208; *Farebrother v. Simmons*, 5 B. & A. 888; *Rayner v. Linthorne*, 2 C. & P. 124; *Cooper v. Smith*, 15 East. 108. In *The Utica Ins. Co. v. Toledo Ins. Co.* 17 Barb. 182, it is said: "The general principle that a party cannot act for himself in the same transaction in which he undertakes to act for another is well settled, and the validity of a contract in which he acts, and to which he is a party as agent for a third person, and also in his own behalf, does not depend upon the question whether he makes an advantage by the transaction. * * The character of agent for one party to a contract, and that of principal upon the other part, are incompatible." *Ex parte Bennett*, 10 Vesey 881; *Florence v. Adams*, 2 Robinson 556; *Beal v. McKinnan*, 6 Louis 407; *Bentley v. Columbia Ins. Co.*, 19 Barb. 595.

The law, indeed, makes the principal, for a special purpose, i. e., the delivery of the instrument, the agent of his sureties. Their delivery of the instrument to the principal, after placing their names upon it, authorizes the principal to make the delivery to the obligee, for such is the channel through which the paper would properly pass in reaching the obligee. And the delivery of the instrument to be by him at once transferred to the obligee, is a delivery entirely consistent with the interests and inclination of the principal, and for such a purpose the delivery is proper. The original contract is between the principal on the bond and the obligee. The compliance with the contract is the delivery of the bond by the principal obligor to the obligee, duly executed by himself and his

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sureties. The contract between the principal on the bond and his sureties is that they will enable him to comply with his original contract. For this purpose they sign and deliver to him the instrument, that in the fulfillment of his original contract he may deliver it to the obligee.

Now is it not clear, that as the general purpose of the delivery by the sureties to the principal is that he may make a delivery to the obligee, no conditions imposed upon such delivery will bind the obligee unless they are known to him? In the case of *Pickering v. Busk*, 15 East. 38, Lord ELLENBOROUGH, C. J., states the law thus: "Strangers can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the reality of which is afterward to be tried by the fact. *It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter*; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody?" And where the surety signs and delivers the bond to the principal, from whom it would naturally pass to the obligee, are we to suppose that such delivery to the principal was merely for safe custody? The rule laid down in the case cited is, "that where the commodity is sent in such a way and to

such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." BAYLEY, J. If the servant of a horse dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." And is not the surety upon a bond, who delivers it to his principal in apparent proper condition to be delivered by him to the obligee, and with the general authority to make such delivery, but circumscribed by a condition, unknown to the obligee, bound by the delivery which the principal may make in disregard of the condition? The rule is stated by a learned author thus: "An agent's authority is that which is given by the declared terms of his appointment, notwithstanding secret instructions; or that with which he is clothed by the character in which he is held out to the world, although not within the words of his commission. Whatever is done under an authority thus manifested, is actually within the authority, and the principal is bound for that reason; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. * * The appearance of the authority is one thing, and for that the principal is responsible." 1 Pars. on Cont. 44. The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore, the benefit of such condition shall not avail the surety.

Thus, in our opinion, should the rule be established upon principle; and as it appears by the examination we have made, that the authorities relied upon to sustain a contrary rule are, in the main, irrelevant, and are in turn quoted to support the cited decisions which are really in point, we are inclined, after a review of all the cases, to regard the real weight of well considered decisions as sustaining:

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the rule which to us seems to rest also upon a correct principle.

So far as the decision of the case of *Pepper v. The State*, *supra*, rests upon the construction of the statute, and upon the fact of forgery, we are not called upon to review it.

The action of the court below upon the demurrer was correct.

The judgment in this case is affirmed, with one-eighth of 1 per cent. damages, and costs.

H. W. Chase and *J. A. Wilstach*, for appellants.

John Pettit, for appellee.

NOTE.—The counsel for appellant cited *Pepper v. The State*, 22 Ind. 399; *Awde v. Dixon*, 6 Exo. 869; *Leaf v. Gibbs*, 4 C. & P. 466; *Johnson v. Baker*, 4 B. & A. 440; *The State v. Boddy*, 7 Blk. 355.

Appellee cited *Millett v. Parker*, 2 Met. (Ky.) 608; 1 Bouv. Inst. 345; 2 *id.* 396.

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McGINNIS v. THE STATE.

CRIMINAL LAW.—COPY OF WRITING.—The court cannot compel the defendant in a criminal prosecution to produce an instrument in writing, in his possession, to be used in evidence against him.

LARCENY.—PROOF OF CONTENTS OF BANK NOTES.—On the trial of a prosecution for the larceny of bank notes, or other written instruments, where the stolen property is alleged to be in the possession of the accused, parol evidence may be given of the contents of the notes or writings, without notice to the accused to produce them.

Williams v. The State, 16 Ind. 461, overruled.

FELONY.—COMMON PLEAS.—On the trial of an information for grand larceny, in the Court of Common Pleas, no evidence was given to show that the defendant had not been indicted in the Circuit Court for the offense, but it did appear in evidence that the case was tried on the next day after the commission of the offense.

Held, that this court will take official notice that the Circuit Court could not have been in session between the commission of the offense and the trial.

APPEAL from the *Vanderburgh* Common Pleas.

ELLIOTT, C. J.— This was a prosecution instituted in the Court of Common Pleas of *Vanderburgh* County, at the *May* term, 1865, against *Peter McGinnis*, for grand larceny, in stealing, among other articles, one *United States* treasury note, of the denomination and value of \$10, the personal property of *Andrew J. Harvey*. The information alleged that the defendant was confined in the county jail, on a charge of having committed said larceny, and that he had not been indicted therefor by the grand jury of the county.

The crime is alleged to have been committed on the 4th day of *May*, 1865, and the information was filed on the 5th day of the same month. The defendant was tried by a jury, convicted, and sentenced to pay a fine of \$1, and to be imprisoned in the state prison for the term of two years. A motion for a new trial was overruled, and judgment rendered on the verdict of the jury.

The errors assigned are: 1. That the court erred in admitting parol evidence of the contents of the *United States* treasury note alleged to have been stolen, no foundation having been laid for such proof, and no notice served on the defendant to produce the note. 2. That the court erred in overruling the defendant's motion for a new trial.

The evidence is all in the record. It is shown by a bill of exceptions that, on the trial of the cause, *Andrew J. Harvey*, the alleged owner of the property described in the information, was sworn and examined as a witness for the State, and having testified that he and the defendant slept together on the night of the 4th of *May*, and that he missed his money (which was in bank notes,) and his pocket book in the morning, was asked by the district attorney "to describe the contents of the notes which he had missed," to which the defendant objected, on the grounds that "no foundation had been laid on which the State could offer such evidence, and because the State had served no notice on the defendant to produce the *United States* treasury

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notes alleged in the information to have been stolen by the defendant." But the court overruled the objection, and the witness thereupon testified that "the bank notes which I missed were *United States* treasury notes; one *United States* treasury note was of the denomination of \$10, and, I thought, was of the value of \$10. There was also some other money, in all some \$18 or \$20. I have never seen the pocket book or bank notes since." There was nothing in the evidence showing that the treasury note had passed into the hands of any third person.

According to the ruling of this court in *Williams v. The State*, 16 Ind. 461, the court below erred in permitting the evidence of the contents of the treasury note to be given to the jury over the defendant's objection, no notice having first been given to the defendant to produce it. In that case it is said: "Under such circumstances, parol evidence of the contents of the bank notes would seem to be admissible, the defendant having had due notice to produce them; but no such notice was given, hence the evidence was inadmissible. This point has been fully considered by this court in a recent case. *Armitage v. The State*, 13 Ind. 441. It was there held that on an indictment of a party for having in his possession counterfeit bank notes, notice must be given to the defendant to produce them, before parol evidence of their contents could be introduced."

The case of *Williams v. The State*, *supra*, was an indictment for stealing a pocket book containing bank notes, with a count for robbery of the same articles. In *Armitage v. The State*, upon the authority of which the former case was decided, the prisoner was indicted for feloniously having in his possession, with intent to put them in circulation, forty counterfeit \$5 bank notes, issued by the *Market Bank*, and alleged to be in the possession of the defendant, and therefore a more particular description of them was to the jurors unknown. A witness was permitted to testify on the trial, over the objection of the defendant, that he sold

the defendant \$200 in counterfeit bills, being \$4 and \$5 bills on the *Market Bank of New York*.

It is well settled in criminal cases, that the court cannot compel the defendant to produce an instrument in writing, in his possession, to be used in evidence against him, as to do so would be to compel the defendant to furnish evidence against himself, which the law prohibits. And it is also evident, where the instrument in writing is the subject of the prosecution, and is described in the indictment in such a manner as to give the defendant an advantage on the trial by producing it, that he will do so. The description of the instrument in the indictment must be such that it would always serve to notify the defendant of the nature of the charge against him, save him from surprise, and enable him to be prepared to produce the writing when it was his interest to produce it. But when its production would be likely to work an injury to the defendant, by aiding in his conviction, it could not be expected that he would produce it in response to the notice. It is, therefore, difficult to perceive what benefit could result, either to the state or the defendant, from the giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him, in the minds of the jury, upon his refusal to produce it after notice.

These reasons apply, perhaps, with equal force, in cases of prosecutions for forgery, as well as in those for larceny; but it is not our intention, in this opinion, to pass upon, or question, the correctness of the rule as laid down in *Armitage v. The State*, as applicable to prosecutions for forgery, as there are reasons why a distinction between the two classes of cases, in this rule of evidence, may be drawn.

In cases of forgery, or of knowingly uttering counterfeit instruments of writing, every part of the entire contents of the instrument alleged to be forged constitutes a material part of the subject of the offense, and, therefore,

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"the indictment must profess to set out an exact copy of the counterfeit, that the court may see that it is one of those instruments, the false making or passing of which is punishable by law." *The State v. Atkins*, 5 Blackf. 458. Or, if the instrument is lost or destroyed, or is in the possession of the defendant, such special fact must be averred as an excuse for not setting out a copy. *Armitage v. The State*, *supra*.

But this particularity is not required in an indictment for stealing a written instrument. The offense, in larceny, consists in the felonious stealing of the personal goods of another of some value, and the description of the instrument in the indictment need only be such as to show its nature and value, for beyond that its contents are immaterial for the purposes of the prosecution, and hence the necessity of producing it on trial, and giving it in evidence, is much less than in cases of forgery. 2 Arch. Crim. Pleading and Practice, side p. 395. This author also sustains the distinction drawn between cases of larceny and forgery as to the rule of evidence. He says: "Upon an indictment for the forgery of a written instrument, the forged instrument must be produced, unless it has been destroyed by the defendant, or unless it be in his possession and he refuse to produce it after notice. But upon an indictment for stealing a written instrument, or destroying a will, or the like, no notice to produce it is necessary, but secondary evidence of the instrument is admissible without it." Vol. 1, 7th ed., top p. 437, and refers to *Rex v. Aickles*, 1 Leach 330.

Again: "There are some cases, however, in which a notice to produce is not necessary: first, a notice to produce a notice is not necessary in any case; secondly, in larceny of a written instrument, secondary evidence of it may be given at the trial, without giving the prisoner a notice to produce the original; in the same manner as in civil cases, in trover for a written instrument, the nature of the instrument may be proved, without giving notice to produce

the original." Same vol., top p. 447. It is said in *Armistage v. The State*, *supra*, that the "English courts have pretty uniformly held that there should be no difference in the rule, in that respect, between criminal and civil procedure; that in either, secondary evidence of the contents of a writing should not be received until notice has been given to the opposite party to produce it upon the trial, when it is shown to be in the possession of such party," and refers to *Rex v. Gibson*, Rus. and Ryan 188, and *Rex v. The Inhabitants of Rawden*, 8 B. and C. 708. We have examined these cases. The latter was a prosecution to remove a pauper from one township to another. On the trial it was proved that the pauper occupied a tenement of £10 per annum, and paid rent and taxes for the same. In answer, it was proposed to prove by parol that the pauper was not the sole tenant, but that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, the court held that it could only be proved by the production of that instrument. It was not shown that the writing was in the possession of the pauper, nor was any question as to notice to him to produce it raised or decided in the case. The only report or notice we find of the case of *Rex v. Gibson* is in a note to *Rex v. Buttery et al.*, 1 Rus. and Ryan 842, in which it is referred to as a manuscript. The note is, that "On an indictment for forging a will, a probate of the will unrepealed was put in, and relied on as a bar, and *Rex v. Vincent*, 1 Str. 481, was cited as an authority, but Lord ELLENBOROUGH held that case not law, and the prisoner was convicted and executed." It is evident that neither of these cases affords any authority on the question under discussion.

In the *Commonwealth v. Messinger et al.*, 1 Binney 273, TILGHMAN, C. J., in giving his opinion in favor of permitting parol evidence of the instrument, without notice to the defendant to produce it, says, that the law seems to be settled in *England* that there is no distinction between

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civil and criminal cases, and that notice must be given to the defendant in a criminal prosecution to produce a written instrument in his possession, before parol evidence of its contents can be given, and refers to the cases of *Le Merchant*, 1 McNally 250; *The King v. Aickles*, 1 Leach 330; *The King v. Watson*, 1 McNally 234; and *Gates, qui tam, v. Winter*, 2 D. & E. 306.

But BRACKENRIDGE, Justice, in his opinion in the same case, says: "If we examine the cases in the books which have been referred to, or which bear upon the point, we shall find that they are cases of evidence of something in the possession of the party originally, or which had come to his possession, and of which it did not necessarily follow that evidence would be offered on the trial, as in the case of *Molton, quitam, v. Harris*, 2 Esp. N. P. 549." We have not been able to find the reports containing the cases referred to by TILGHMAN, C. J.

But whatever may be the rule in the *English* courts, we are satisfied that in this county, the current rule of decisions in prosecutions for larceny is in favor of admitting parol evidence of a written instrument which is the subject of the prosecution, and is in the possession of the prisoner, without first giving notice to produce it; indeed, we have not been able to find a single case, either *English* or *American*, to the contrary, except that of *Williams v. The State*, *supra*. This position is fully sustained by the cases of *Moore v. The Commonwealth*, 2 Leigh 701; *The Commonwealth v. Messinger et al.*, 1 Binney 273; *The People v. Holbrook*, 18 John. 90. In the latter case, the court say: "We are of opinion that parol evidence of the contents and amount of the notes charged to have been stolen was properly received, without accounting for their non-production. It has been repeatedly decided in the Courts of Common Pleas and King's Bench in *England*, that in an action of *trover* for a bond and notes, no notice to produce the thing sought to be recovered was necessary."

The position, in our judgment, is supported both by

reason and authority. We therefore hold that on the trial of a prosecution for the larceny of bank notes, or other written instruments, where the writings *that are the subject of the larceny charged* are alleged to be in the hands of the accused, parol evidence of the contents may be given without notice to the accused to produce them.

It follows that the case of *Williams v. The State, supra*, is overruled.

The second error assigned is that the court erred in overruling the defendant's motion for a new trial. The causes filed for a new trial, so far as they are applicable to the question discussed under this assignment of error, are, that the finding of the jury is contrary to the evidence, and that it is also contrary to law. The point raised is that the evidence shows that the information was filed before the offense was committed.

The information was filed on the 5th of *May*, 1865, and the offense is charged to have been committed on the 4th of the same month.

On the trial, *Harvey*, the prosecuting witness, having testified that he and the defendant were deck hands on the same steamboat, on her trip from *Nashville* to *Evansville*, proceeds thus: "We arrived at *Evansville* from *Nashville* yesterday, *Thursday, May 4th*, 1865; in the afternoon of that day, at about 4 o'clock, we, together with the rest of the deck hands on the same steamboat, were paid off. The defendant and I slept together that night, which was last night. The next morning I missed my money, which was in bank notes, and my pocket book," &c. The record shows that the court was in session at the time the information was filed, and all the witnesses speak of the time of the arrival of the steamboat as being the day before the trial, and the circumstances connected with the alleged larceny as having occurred the night previous to, and on the morning of, the day of the trial; and it is insisted by the defendant's counsel that the record shows the trial to have occurred on the 9th of the month, and that the

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information, having been filed on the 5th of the same month, was filed before the commission of the offense. In this, however, he is mistaken. True, the entry of the trial was made on the order book on the 9th, but it is preceded by the following statement: "And afterward, to-wit: on the 9th day of *May*, 1865, in the court and before the judge aforesaid, the order in the words and figures following was made, to-wit:" then follows the entry of the trial, but there is nothing in it showing on what day it occurred.

We think it apparent, from the whole record, that the trial, in fact, occurred on the 5th of the month. Besides, the prosecuting witness swore positively that the offense was committed on the night of the 4th of the month, which was prior to the date of the filing of the information. The evidence in the case, though not conclusive of the defendant's guilt, or as to the venue, we think was sufficient to justify the finding of the jury, and we cannot disturb the verdict.

It is claimed that there was no evidence showing that the defendant had not been indicted in the Circuit Court for the offense. No direct evidence of that fact appears in the record, but the evidence shows that the offense was committed on the night of the 4th of *May*, and the cause was tried on the following day. The Common Pleas Court was in session at the time, and we will take judicial notice of the fact that the Circuit Court of the county could not have been in session after the commission of the offense, and before the case was tried in the Court of Common Pleas.

The judgment is affirmed, with costs.

C. E. Marsh, for appellant.

D. H. Williamson, Attorney General, for the State.

Coffman v. Keightley, Auditor of Putnam County, and Another.

COFFMAN v. KEIGHTLEY, Auditor of *Putnam* county, and Another.*

BOUNTIES TO VOLUNTEERS.—The act of *March 3, 1865*, which legalises the appropriations made by county boards and municipal authorities for bounties to volunteers, is not in conflict with the law or the authority of the *United States*, and is valid.

TITLES OF LAWS.—The title of the act of *March 3, supra*, while not the most appropriate, is not so defective as to render the law unconstitutional.

APPEAL from the *Putnam* Circuit Court.

GREGORY, J.—*Coffman*, a tax payer of *Putnam* county, filed his complaint against the *Board of Commissioners*, the *Auditor*, and his deputy, praying for an injunction, restraining the defendants from issuing or circulating certain county orders, and from assessing a tax or appropriating money for the payment thereof. A demurrer was sustained to the complaint, which presents the question for consideration.

On the 6th of *January, 1865*, the *Board of Commissioners* of *Putnam* county made an order, directing the auditor to issue county orders for two hundred dollars each, payable the 1st of *April, 1866*, with interest, and also county orders for two hundred dollars each, payable the 1st of *April, 1867*, with interest. Five hundred of each class were to be issued and placed in the hands of *William D. Allen*, *James G. Edwards* and *A. H. Gilmore*, who were appointed recruiting agents of the county, and who were directed to proceed to obtain recruits for the *United States* service, to be credited to the county, and as fast as they obtained them, and had them mustered into service, they were to deliver to each of them two of the county orders, one of each class. The recruits were to be credited to each of the townships, in the proportion of their several quotas. On the 8d of *February* following, the commissioners modified

* This and the following case were decided at the *November Term, 1865*, and are published here to meet a general desire of the bar.

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this order, by directing the issue of the county orders in question to each township, equal in number to their several quotas under the last call of the President of the *United States* for troops. Under this modified order, recruiting officers were appointed for each township, who were to receive a compensation for each recruit.

The validity of these orders is the turning point of the case in judgment.

On the 11th of *May*, 1861, the legislature passed an act in which it is provided, "that the boards of commissioners of the several counties of the state, and the incorporated cities and towns of this state be, and they are hereby, authorized to appropriate out of their respective county, city or town treasuries, such sums of money as they may deem proper, for the protection and maintenance of the families of volunteers in the army of the *United States*, and of the state of *Indiana*, during their continuance in such armies, and to make such appropriations for the purchase of arms and equipments, for the raising and maintaining of military companies within their respective jurisdictions, either for home defense, or for the service of this state or the *United States*, and such other necessary expenditures for the defense of their respective counties, cities and towns as the exigencies of the times may, in their judgment, demand. And the county boards and the authorities of the incorporated towns and cities are hereby empowered to make such regulations as they may think right and proper, in the disbursement of said appropriations." Acts of the special session 1861, § 1, p. 22.

Exigencies arose during the late rebellion unlooked for at the passage of this act. It was the settled policy of *Indiana* to promptly respond to every call made upon her for troops, to serve in the national army in defense of our common country. And while thousands of brave men were ready to volunteer, the body of those who remained at home were ever ready to share the burden. At each successive call of the President for troops, in response to the

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urgent desire of the people, our several boards of commissioners, city councils, and other local authorities made, from time to time, appropriations for the support of soldiers' families, and provided for local bounties to volunteers and drafted men. The moving cause for many of these provisions for local bounties, doubtless, was a desire to relieve their several localities from pending drafts. It was found that in a large majority, perhaps, of the cases, the local authorities had transcended the power conferred on them by the act of 1861, and in compliance with what seemed, at the time, to be an almost universal wish, the legislature passed the act of *March 8d*, 1865, in which it is provided, "that all bonds or orders heretofore issued, or appropriations made, by and under the authority of the boards of commissioners of the several counties of this state, and the incorporated cities and towns thereof, for the purpose of procuring or furnishing volunteers and drafted men for the army or navy of the *United States*, or for maintaining the families of volunteers, soldiers, substitutes or drafted men, or otherwise to aid the government in suppressing the rebellion, be and the same are hereby ratified, affirmed and legalized." Acts of 1865, § 1, p. 126.

It is urged that the war power is exclusively in Congress, and that it is not competent for the state legislatures to authorize the giving of local bounties to induce volunteering, in filling up the army or navy of the national government. This can hardly be considered an open question. The Supreme Court of *Connecticut*, in the case of *Booth et al., v. The Town of Woodbury*, 27 Law Reporter, 232, held valid an appropriation by the town of *Woodbury*, under the sanction of an act of the legislature of that state, of six thousand dollars, to be divided among the men who should be drafted to fill the quota of that town, authorized by a law of the *United States*, and called for by the President, and for the purpose of assisting the citizens so drafted to obtain substitutes, or as a bounty, if they personally answered the draft and served.

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The Supreme Court of *Pennsylvania*, in the case of *Speer et al. v. The School Directors and Burgess and Council of Blairsville*, 4 *American Law Register*, 661, held that the payment of bounties to volunteers, to enable a borough to furnish its military quota under an impending, and, as yet, unexecuted draft, is a payment for a public or municipal purpose; and a law authorizing a borough or other municipality to raise money for this purpose, by borrowing and taxation, is therefore constitutional.

The same thing was recognized by the Supreme Court of *Massachusetts*, in the case of *Fowler et al. v. Selectmen & Treasurer of Danvers*, 8 Allen, 80.

Justice AGNEW, in the *Pennsylvania* case, fully meets and answers the constitutional objection urged in argument in the case in judgment. He says: "There is nothing, in my judgment, in the argument founded upon the alleged repugnance of the law to the federal power to raise and support armies. There is no conflict of jurisdiction or of power. Admitting, to the fullest extent, the incompatibility of any state law assuming to regulate or to interfere with the raising and supporting of a federal army, there is here no interference, no regulation, and no repugnance. Congress purposely refrained from occupying the whole field of power, and expressly provided for the acceptance of volunteers in discharge of the draft. The act of *February 24th*, 1864, after providing for the distribution of military service by quotas, among the municipalities of each state, declared that "all volunteers who may enlist after the draft shall be ordered, and before it shall actually be made, shall be deducted from the number ordered to be drafted in such ward, town or township, precinct, election district, or county." This portion of the field, as to procuring volunteers, was therefore left open to the exercise of any means to induce persons to enlist in relief of the municipality from the pending, but as yet unexecuted draft. That this was intentional is recognized by the terms of the law. The third proviso of the seventh section, which provides for transfers into the

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naval service, declares that the bounty money received from the state, by any mariner or seaman enlisting from that state, shall be deducted from his prize money. The proviso in the twentieth section, authorizing the discharge of minors entering the service without the consent of their parents or guardians, expressly requires such person, their parents or guardians, first to repay to the government, and to the state and local authorities, all bounties and advance pay which may have been paid to them. The federal law, therefore, does not assume to control or direct the procuring of volunteers. It simply suffers or permits the citizen to come forward voluntarily, and accept the service of the men to be drafted, and contemplates that inducements, in the shape of bounties, will be held out to volunteers by the states and municipalities from which they come."

The argument, therefore, that the act of *March 8d, supra*, so far as the same legalizes the payment of bounties to volunteers, comes in conflict with the federal law for drafting men into the service has no foundation. There is not a single point of conflict. The bounty operates only upon the will of the citizen to induce him to volunteer, and ends with his acceptance into service. It does not even undertake to determine his fitness to serve, but leaves this to the operation of the federal law.

We have been referred to the case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, S. C. Rep. 622. The ruling in that case was dissented from by TANEY, C. J., and by THOMPSON and DANIELS, J. J., was pronounced in *Weaver v. Fegely*, 5 Casey, 29, "a most mischievous heresy," and doubted if not overruled in *Moore v. The State of Illinois*, 14 Howard S. C. Rep., 13. The decision in *Prigg's* case had its origin in American slavery, so potent in shaping our legislation, and too often finding its way into the more sacred precincts of justice.

Some objection has been urged to the title of the act of *March 8*. It has been said that it is in conflict with section 10, article 4, of the constitution of this state, requiring that

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"every act shall embrace but one subject, and matters connected therewith, which subject shall be expressed in the title." The title of the act in question is not a very apt one, but "the question whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." Per MARSHALL, C. J., in *Fletcher v. Peck*, 6 Cranch, 87; 2 Curtis, 328.

We think the Circuit Court committed no error in sustaining the demurrer to the complaint. The judgment is affirmed with costs.

Williamson & Daggy, for appellant.

J. A. Matson, for appellees.

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COUNTY BOARDS—SPECIAL SESSIONS.—*Scmdle*, that under the statute authorizing the County Auditor to call a special session of the Board of County Commissioners, "whenever the interests of the county demand it," the auditor must determine the necessity of such special session, and his action cannot be reviewed by the courts.

SAME.—The Auditor of Putnam county issued a call for a special session of the Board of County Commissioners "for the purpose of giving a bounty

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to recruits to save the citizens of the county from a draft, and to make appropriations for the benefit of soldiers' families.

Held, that the objects stated were of interest to the county, and authorized the assembling of the county board in special session.

Held, also, that it is not necessary for the auditor to state in his call the objects of the special session, and if they are stated the board is not confined in their action to the consideration of the specified subjects.

BOUNTIES TO SOLDIERS—POWER OF COUNTY BOARDS.—The Board of Commissioners of Putnam County, in *January*, 1865, passed an order directing the auditor to issue to each person in the county who had paid money to relieve the man who were drafted under a late draft, or to relieve any township from the draft, a county order for the amount so paid out. It was further ordered that no more than \$400 should be paid to any man who had put in a substitute, and that \$400 should be paid to each drafted man who was mustered into the service, or to his wife and family in case of his death.

Held, that the order of the board was unauthorized at the time it was made, and that it was not made valid by the act of *March 3*, 1865.

APPEAL from the *Putnam* Circuit Court.

RAY, J.—The appellant instituted this proceeding to enjoin the appellees from issuing certain orders and bonds in accordance with a resolution of the Board of Commissioners of the County of *Putnam*, passed *January 6th*, 1865.

A demurrer filed to the complaint was sustained by the court, and the application was refused.

The appellant insists that the proceedings of the board of commissioners were void, because such action was had at a special session, and the members of the board had not been summoned as required by law.

The record shows the objection to be untrue. The notice required by statute (1 G. & H., § 1, 248,) to be given by the auditor of the county, to the members of the board, is set out in full in the record, and the acknowledgment of service thereof is attached thereto.

The next objection presented, is that such special sessions are only to be called "whenever the interests of the county demand it." It might be sufficient answer, perhaps, to say that the auditor is the person who must determine when the interests of the county require such meeting of the

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beard, and that the court will not review his action in a matter which the statute has committed alone to his judgment. But the summons recites, in terms, the objects of the meeting. The special session, it states, is called "for the purpose of giving a bounty to recruits, to save the citizens of the county from a draft on the 15th day of February, 1865; also, to provide for the re-payment to parties who have advanced money to procure recruits under the preceding drafts; also to make appropriations for the benefit of soldiers' families."

We have already held in the case of *Coffman v. Keightley, Auditor, &c., ante.*, p. 509, that the object first stated, was one of interest to the county. That the last purpose indicated in the recital is within the authorized objects is not disputed. The board was then called together for purposes in which the county was deeply interested. The statute provides that the board shall be summoned for any object in which the county is interested, but it does not, in terms, limit their action to that object, nor does it require the auditor to state, in any official form, the purpose for which they are convened. Were we then to hold, that the action of the board must be limited to those matters which, in the opinion of the auditor, "the interests of the county demand" they should consider, while the statute permits him to lock within his own breast all knowledge of the motives that prompt his action, we would simply make the validity of every order of the board at their special sessions to depend upon the uncertain memory of the officer empowered to summon them together. We do not think the legislature intended to rest the validity of such action on such a basis. It seems more reasonable to suppose, that when the board have been summoned together, as the law has not provided that the special object of their meeting should be stated, that they are to be intrusted, rather than the auditor, with the power to determine the subjects which the interests of the county demand they should consider.

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The board of commissioners having then been legally notified to meet, under circumstances expressly authorized by statute, this question only remains for determination: Was their action upon the matters considered by them authorized by law, or has it been legalized by the action of the legislature?

The order, the legality of which has been denied, reads as follows:

"Ordered by the board, that the auditor of *Putnam* county issue to each of the persons in the several townships of said county who paid out money to relieve men drafted in said township, in the late draft, or for money paid out to relieve any of said townships from such draft, or the citizens thereof, and for drafted men, county orders for such sums so paid out, payable as follows: * * *

It is hereby intended and ordered, that no greater sum than \$400 shall be paid to any person who has furnished a substitute, no matter how much he may have paid; and \$400 shall also be paid to each drafted man who was mustered into the *United States* service, or to his wife and family in case of his death, when the drafted man did not receive any local bounty."

It is admitted that at the date the action was had by the commissioners, no law authorized such proceedings. It was held, in the case of *Booth et al. v. The Town of Woodbury*, by the Supreme Court of *Connecticut*, *Law Reporter*, vol. 27, No. 4, p. 282, "That in the absence of authority so conferred, a town has no power to appropriate money for gratuities to men drafted for the military service of the *United States*." "Towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to discharge their duties and carry into effect the objects and purposes of their creation." *Abendroth v. Greenwich*, 29 Conn. 363. "They act, not by any inherent right of legislation, like the legislature of the state, but their authority is delegated." 8 Conn. 254.

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The legislature, however, at its forty-third session, passed "an act to legalize the issuing of bonds, and making appropriations, and the levy and assessment for taxes in certain cases, and making it unlawful, after the quota of the state on the present call is filled, for boards of county commissioners, or the municipal authorities of incorporated towns and cities, to pay any money out of their treasuries or to issue any bonds, orders or evidences of indebtedness, to give bounties to volunteers, drafted men or substitutes." This act was approved March 8d, 1865.

The first section of the law provides, "That all bonds or orders heretofore issued, or appropriations made, by and under the authority of the boards of commissioners of the several counties of this state, and the incorporated cities and towns thereof, for the purpose of procuring or furnishing volunteers and drafted men for the army and navy of the *United States*, or for maintaining the families of volunteers, soldiers, substitutes or drafted men, or otherwise to aid the government in suppressing the rebellion, be and the same are hereby ratified, affirmed, and legalized."

The order made by the Board of Commissioners of *Putnam* county was clearly not "for the purpose of *furnishing* volunteers and drafted men for the army and navy of the *United States*," nor for the purpose of "maintaining their families." Was it then passed "to aid the government in suppressing the rebellion"? We can readily understand how the payment of a bounty to volunteers, thereby inducing men to enter promptly into the military service of the government, and thus increase the strength and power of her armies in the field, at an earlier date and at less expense than could be accomplished by a draft, would "aid the government."

But no aid was afforded to the government in suppressing the rebellion by the *re-payment* to individuals of the money they had expended to relieve the men drafted, or the citizens or townships from the draft. The original expenditure of the money may ~~have~~ accomplished that

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result, but upon its *re-payment*, the existence of the rebellion did not perceptibly depend. The payment of \$400 to men drafted under the former call for troops, when the men were already mustered into the army of the *United States*, and were then rendering most efficient aid to the government in suppressing the rebellion, clearly does not come within the intent or the letter of the statute. The Supreme Court of *Massachusetts*, in the case of *Fowler et al. v. Selectmen, &c., of Danvers*, 8 Allen, 80., held that it was not an act in "aid of the war, to give increased compensation to those who are already enlisted, and whose services as soldiers are already pledged to the government."

The second section of the act declares valid any levy and assessment of taxes, for the purposes enumerated in the foregoing section. It contains also this proviso: "That the provisions of this act shall not be construed to cover or include debts contracted by individuals to relieve themselves from any draft that has heretofore taken place, nor shall the same be construed to authorize the assumption or payment of such debts by any county, town or city; but the provisions of this act are intended to apply to the action of counties, towns and cities which have acted through their legally constituted authorities, and have issued their bonds, orders, or other evidences of indebtedness, to raise money to pay bounties to volunteers, and drafted men, who have entered the military service of the *United States*, or to maintain and support the families of volunteers, drafted men and substitutes."

It is urged that as the proviso declares that the act shall not be construed to authorize appropriations to "cover or include debts contracted by individuals, to relieve *themselves* from any draft," that thereby it admits, that by proper construction all debts contracted by individuals to relieve *others* from such draft are within its provisions. But the argument, false in itself, is utterly destroyed by the clause following, declaratory of the purposes of the statute, and limiting its benefits "to counties, towns and cities, which

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have acted through their legally constituted authorities," thereby absolutely excluding all claims of persons who have acted in their individual capacity.

We conclude, therefore, that the action of the board of county commissioners was unauthorized at the date of its occurrence, and that it has not since been legalized by the law-making power. It is therefore void.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion. Costs against appellees.

Williamson & Daggy, for appellant.

J. A. Matson, for appellees.

PROCEEDINGS
OF THE
SUPREME COURT OF THE STATE OF INDIANA
ON THE ANNOUNCEMENT OF THE
DEATH OF ABRAHAM LINCOLN,
President of the United States.

At the opening of the court, on the morning of the 20th day of *June*, 1865, the following preamble and resolutions, prepared and adopted at a meeting of the bar of the Supreme Court, were presented by a committee, with the request that they might be spread upon the records of the court:

"The death of ABRAHAM LINCOLN, the President of the *United States*, on the 15th day of last *April*, is an event so startling and sorrowful, that the bar cannot suffer it to pass without offering to the court an expression of their appreciation of his lofty and pure character, in all the relations which he sustained in life; and of their profound sorrow for his sudden death, under circumstances so horrible as to have shocked the whole civilized world, and overwhelmed the people of his country with a grief at once more universal and heartfelt than they have ever before known. The bar feel it to be due to themselves and to the court, to give utterance to their sympathy with the universal grief of the nation. They, therefore, respectfully present the following resolutions to the court, and request that they may be spread upon the records:

1. *Resolved*, That the death of ABRAHAM LINCOLN, President of the *United States*, is a great national calamity, which

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nearly and profoundly touches the whole people; that his patient labor and ability, his gentleness and mercy, his unsectional patriotism, and his catholic humanity, are qualities which the country could at any time ill afford to lose; and which, in times like the present, it will be difficult to replace.

2. *Resolved*, That his example, in all the stages of his life, is worthy of imitation by his countrymen, and affords, at the same time, for their encouragement, an assurance that the faithful continuance in well doing will, even in this life, lead to honorable distinction and rewards.

8. *Resolved*, That we tender to the family of the illustrious dead our heartfelt condolence in this night of their affliction and sorrow."

FRAZER, J., in response to the resolutions, said:

I have been requested by my brethren of the bench to say something on this occasion, because I happened to have a slight personal acquaintance with Mr. LINCOLN, before his first nomination for the presidency, and because it is known to them, that my unbounded admiration for his great qualities as a statesman dates prior to the first public suggestion of his name in that connection. For full two years before that event, and before he had entered upon the series of great debates in *Illinois* with the lamented *Douglas*, he seemed to me to be, in all essential respects, the fittest man in the nation for that high office, during that crisis of our national affairs which, it was apparent, could not be much longer delayed, and the most likely to accomplish its correct, and, possibly, peaceful solution. No superior discernment is either shown or claimed in this; it merely happened that I studied him earlier than many others, and the allusion to the fact will be pardoned, I hope, when it is remembered that it cannot but afford me a melancholy pleasure, as I seek to contribute one sprig of myrtle to that unfading chaplet with which the nation and the world will crown his memory.

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Mr. LINCOLN possessed certain traits of character in a remarkable degree, which could not fail to be perceived, and which won for him the personal esteem of almost every one. His great kindness of heart, his transparent and child-like honesty, the simplicity of his tastes and habits, his deep sympathy with the common people, his unfaltering faith that the God of the nations would not allow the Union of these States to be now destroyed, and that he was himself an instrument in Divine hands for the accomplishment of this purpose, his unselfishness, and his unfailing fund of good humor—these are as well understood now as they can ever be in the future, and they contributed largely to his great popularity, and enabled him to discharge unpleasant duties without giving pain or offense, and to unite the country in executing measures now seen to have been wise and necessary, but which, at the time, did not fully meet the general approbation.

But for the confidence which these qualities inspired in his motives and the rectitude of his purposes, the people of the north, jealous of the incroachments of power, might not have submitted to the exercise of that large amount of authority on his part, without which it is probable that we would have failed to suppress the rebellion and have ceased to be numbered amongst the nations.

But he had other qualities contributing, even in a much larger measure, to constitute him, as he was, in my judgment, the first statesman of this age, and the peer of any whom the world has yet produced.

He was always self-possessed. He never lost control of his great faculties, by the influence of excitement or passion. What ruler wielded power in such stormy times? Who ever held the helm of government, when such tremendous forces were hurled against the state; when such a tempest of passion prevailed around him; when such fearful breakers rose up on every side, and when he scarcely knew that the fidelity of any of his crew could be depended upon, and when mutiny was almost every where? And

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yet calmly, though firmly, he held the ship on her course, watchful of every peril, ready for any danger, with a suitable plan for every emergency, and a dauntless, cheerful, hopeful, persistent confidence, which gave courage to every true man about it. And, during all this, no word of hate or malice towards any escaped his lips, and not a single act of harshness, or of mere vengeance, was he provoked to do during the whole of his administration! Amongst the rulers of the world, there is found no parallel to this, except the single case of WASHINGTON, and even he was sometimes betrayed into a terrible outburst of anger.

Mr. LINCOLN was self-reliant and firm, without stubbornness. We have had no president since *Jackson* who was not controlled by his cabinet, and possibly none who had not selected greater men than himself for his counsellors. Mr. LINCOLN called about him the greatest men of his party—*Seward*, *Chase*, *Cameron* and *Bates*, all the competitors he had had in the convention which had nominated him. He availed himself of their advice and counsel; they often differed, it is said, upon the most important measures. He deliberately weighed every suggestion, and decided finally for himself, often even against the wishes of his own party; and having once decided, he adhered to his convictions against whatever influences were invoked to change them.

But I think that the quality for which, more than any other, history will distinguish him, was the greatness of his intellect. Distant nations, less familiar than we are with his goodness which won our love, and his integrity which commanded our confidence, and which have not been stirred by the passions which this fearful civil war engendered here, are now better situated to appreciate this quality than we are—and this is their verdict: That he has shown himself to be amongst the wisest rulers of modern times. He was without early advantages, and labored under the difficulties of a defective education. His boyhood and early manhood were not devoted to the training of his faculties, and the development of their powers.

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And yet I know of no speaker or writer, of the present or the past, who could so thoroughly strip a subject of everything which did not belong to it, and then discuss the subject itself with so much clearness, and exhaust it with so much brevity. And this, to my mind, is the highest proof of intellectual greatness. A clear discrimination, and an accurate perception of things, which constitute the very bone and sinew of intellect, were thus pre-eminently manifested in his character.

Of the wisdom of his measures, so far as any of them have accomplished their full results, there is probably, even now, no two opinions. Of others, which have not yet yielded their fruits, it is impossible now to speak with absolute certainty; but I think that so far, they are each passing day commanding more and more the approval of all intelligent and good men, who at first either doubted or opposed them.

That such a man should have been slain by an assassin, in the interests of the rebellion, after it was clearly seen that the national authority would be speedily restored, awakened a deeper and more universal sorrow, and a sincere and more general public manifestation of grief than has often occurred amongst men. I know not why the God who seemed to guide him in the discharge of his difficult duties, and who could have stricken down the assassin before he did the damnable deed, yet permitted it to be done. But I do know one of the lessons to be learned from it, by all who will receive plain instruction. It may be useful in the future. It would have saved us the lost ones of the last four years, if we had learned it long ago. It is this: that the spirit of the rebellion was execrable beyond measure; that the terrors of the past four years closely bordered on the infernal, and that in dealing with its instigators, originators and leaders as criminals, mere sympathy for *them*, if it shall interfere with the purpose to make the state secure against them and their teachings in the future, will not be mercy, but will be almost itself a crime.

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ELLIOTT, C. J.—*Gentlemen of the Bar*: In responding to your resolutions, I shall not attempt to pronounce a eulogy upon either the life, character or public services of our lamented President. If time and opportunity were afforded, and I were competent to the task, still it would seem superfluous, as I could scarcely expect, after all that has been said and published, to express a new thought, or add a single leaf to the chaplet that crowns his memory. Indeed, he is so enshrined in the hearts of the people, that every patriot's bosom swells with honest praise, more eloquent than language can express.

Under any circumstances, the death of the Chief Magistrate of the nation would be regarded by all as a public bereavement, and would produce general sadness and sorrow. But the death of ABRAHAM LINCOLN by the hand of an assassin, and in view of the motive for the act, and the circumstances which surrounded both the victim and the deed, filled every mind with amazement and consternation, and every heart with inexpressible sorrow and grief. A nation most deeply mourns the loss of its Chief Executive, whom the people had learned to appreciate, honor and love, and their grief is swelled to indignation and horror at the foul manner of his death.

Mr. LINCOLN was the immediate victim of the assassin's blow, but the wound is national, for it is felt by all.

The people are shocked and angered, because they loathe and detest the most wicked crime that terminated the President's life. They are stricken with the deepest sorrow, because a great and good ruler, whom they loved, and in whom they confided, has fallen in his successful labors for the preservation of his country.

To the nation, the life of ABRAHAM LINCOLN was most precious. As an instrument of Divine Providence, he had substantially accomplished a great mission, that will render his name immortal, and cause his memory to be hallowed by all future generations. To finite minds it would seem peculiarly fitting, if not essential, that he should have lived

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to have finished his good work, so nearly accomplished, and to enjoy the full realization of its blessings. But it is otherwise, and we bow in humble submission to Him who controls the destinies of all things. Yet, as "out of the fullness of the heart the mouth speaketh," it is meet that we give full utterance to our feelings of sorrow.

When we remember the broad humanity and great kindness of heart of Mr. LINCOLN, so universally acknowledged and appreciated, it is impossible to conceive that the assassin was impelled to the act by any feeling of personal hatred or revenge toward him; or to believe that its immediate perpetrator is alone responsible for the wicked and fatal deed. The blow was undoubtedly aimed at the life of the government, of which the President was the chosen representative, and, therefore, the selected victim. And whilst we mourn his loss as a great national bereavement, we yet have cause to rejoice in the fact that the government still lives. That it has survived the terrible assaults of a wicked and powerful rebellion, and successfully maintained a desperate struggle for existence, lasting for a period of more than four years, and still retains vitality sufficient to withstand this last unnatural and unexpected shock, affords gratifying evidence, to every loyal and reflecting mind, of the wisdom and justice of its nicely balanced machinery, and of its ability for self protection and preservation.

A lesson is also taught in the fact that, to the author of the crime, just retribution swiftly followed his foul deed. Though he escaped immediate arrest, yet, ere the mortal remains of his honored victim were deposited in their place of final rest, he had ceased to be, and his own remains were hid forever from mortal sight. And, for myself, I may be permitted to say that I trust the world may never know what particular spot of earth is stained by the secret.

ORDERED, that the resolutions be spread upon the records of the court, and that, out of respect to the memory of the deceased Chief Magistrate of the nation, this court do now adjourn.

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Held, that, as the contract was in contravention of good morals, and based on the corruption of a public officer, the court cannot lend its aid to enforce it, but must leave the parties as it found them.

Held, also, that the corruption of the transaction still tainted the fund in the hands of C, though the partnership business had been closed, and A's action to recover it cannot be sustained.

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CORPORATIONS.

See RAILROADS.

1. FREE BANK.—FORFEITURE OF CHARTER.—A free bank organized under the act of May 28, 1852, failing to comply with the provisions of the act of March 3, 1855, (1 G. & H. 124,) did not lose its corporate existence, for all purposes, when the latter act came into force; but under section 48 of that act, its charter would not expire until March 1, 1857, and under section 6, 1 R. S. 1852, p. 240, the bank would have three years from that date to sue and be sued, and to settle, dispose of and convey its property, and divide the capital stock, but not to continue a banking business. *Cunningham v. Clark, Receiver, &c*.....7
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- Held*, that as the contract of guaranty upon the bonds was, upon its

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the objects of the special session, and if they are stated the board is not confined in their action to the consideration of the specified objects.....*Ibid.*

5. BOUNTIES TO SOLDIERS.—POWER OF COUNTY BOARDS.—The Board of Commissioners of Putnam County, in January, 1865, passed an order directing the auditor to issue to each person in the county who had paid money to relieve the men who were drafted under a late draft, or to relieve any township from the draft, a county order for the amount so paid out. It was further ordered that no more than \$400 should be paid to any man who had put in a substitute, and that \$400 should be paid to each drafted man who was mustered into the service, or to his wife and family in case of his death.

Held, that the order of the board was unauthorized at the time it was made, and that it was not made valid by the act of March 31, 1865.....*Ibid.*

COURT OF COMMON PLEAS.

1. JUDGE PRO TEMPORE.—The record of an appeal from a Court of Common Pleas showed that the judge of the court, being unable to attend at the term at which the judgment was rendered, appointed J. S., "a suitable person, and a member of the bar of the State of Indiana, and an attorney of said court," to hold the court for him.
Held, that the words used to describe the person appointed to hold the court, sufficiently show a compliance with the statute, which requires such appointee to be "a regular practicing attorney of the State." *Brown v. Busan*.....194
2. SAME.—The act authorizing the appointment of a judge *pro tempore*, to hold the Court of Common Pleas, in the absence of the regular judge, is constitutional.....*Ibid.*
3. JURISDICTION.—The Court of Common Pleas has jurisdiction of an action brought upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the defendant to answer a charge of

felony in the Circuit Court. *Hawkins v. The State ex rel. Reed*....288

4. DIVORCE.—The Court of Common Pleas has jurisdiction of suits for divorce. *Ewing v. Ewing*.....468

COVENANT.

For rent, runs with the land. See RENT, 1, 2.

CRIMINAL LAW.

See LIQUOR LAW.

1. SEPARATE TRIAL.—In trials for misdemeanors upon information an application for a separate trial is addressed to the discretion of the judge before whom the cause is heard. *Hibbs et al v. The State*....140
2. BILL OF EXCEPTIONS IN CRIMINAL CASES.—In criminal prosecutions, the bill of exceptions must be made out and presented to the judge at the time of the trial, or within such time as the court may allow, during the term. *Stewart v. The State*....142
3. SAME.—The legal presumption is that the judge signed the bill of exceptions when presented, and that it was filed by the clerk when signed.....*Ibid.*
4. INDICTMENT.—An indictment becomes a part of the record when filed, without any further action of the court.....*Ibid.*
5. GRAND JURY.—The consultations of the grand jury are, by law, secret, and it is not competent to inquire into the amount of evidence on which they acted.....*Ibid.*
6. SAME.—INSTRUCTIONS TO.—It is the duty of the court to instruct the grand jury, but a failure to do so does not affect the validity of their presentments.....*Ibid.*
7. ATTORNEY GENERAL.—The Attorney General, alone, is authorized by law to prosecute and defend criminal or state prosecutions in the Supreme Court.....*Ibid.*
8. MURDER.—SELF DEFENSE.—On the trial of an indictment for murder in the second degree, the court instructed the jury that no "threatening actions" of the deceased could justify the defendant in taking life, and, in another instruction, told

- them that if the deceased made a violent assault upon the defendant while he was retreating, and the deceased pursued him, and the defendant had reasonable apprehensions of great bodily harm, and had used all reasonable means to keep out of the way, he would be justified in repelling the assault, and if, in so doing, death resulted, he ought to be acquitted.
- Held*, that neither instruction correctly stated the law. The latter was erroneous, because retreat is not always a condition which must precede the exercise of the right of self-defense. *Creek v. The State* 151
9. **MANSLAUGHTER**.—In manslaughter, the killing, if upon a sudden heat, must be voluntarily done, and without malice.....*Ibid*.
10. **SELF-DEFENSE**.—**FEAR OF BODILY HARM**.—To justify the killing of another on the ground of fear of great bodily harm, there must be reasonable cause for such fear, and it is not sufficient to show that the defendant was in actual fear....*Ibid*.
11. **FEAR**.—The criminal law, while indulging to a humane extent the mere infirmities of human nature, nevertheless requires of sane men the exercise of a mastery over their fears, as well as their passions.....*Ibid*.
12. **NEW TRIAL**.—**SEPARATION OF JURY WITHOUT LEAVE**.—*Seemle*, that if after the jury have retired to deliberate on their verdict, some of them separate from their fellows, without the leave of the court, and without being attended by an officer, a new trial will not be granted, (unless our statute makes it imperative,) if the verdict is clearly right upon the evidence, but if the correctness of the verdict be doubtful, a new trial must be granted. But in all such cases, the misconduct being established, the burden is upon the prosecution to show that the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties.*Ibid*.
18. **QUERE**.—Whether the statute (2 G. & H., sec. 142, p. 423,) does not make it imperative on the court to grant a new trial for such cause.*Ibid*.
14. **GRAND JURY**.—**INDICTMENT**.—To an indictment the defendant pleaded, 1st, that it had been found by the grand jury without evidence; and 2d, that no vote was taken by the grand jury.
- Held*, that the pleas were correctly rejected.
- Held*, also, that the return of a bill into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding, which cannot be controverted by plea....*Ibid*.
15. **INFORMATION**.—In an information in the Court of Common Pleas for murder, the prosecuting attorney informed the court that A B was in custody, and confined in jail, on a charge of felony, without indictment, &c., "said charge being described as follows:" A description of murder in the second degree followed, but the information contained no direct averment that the defendant had committed the crime.
- Held*, that the information was bad. *Finn v. The State*..... 286
16. **TOWN—CITY**.—The word *town* is generic, comprehending city, and hence the law which makes shooting in a "town or village" a misdemeanor applies to cities.....*Ibid*.
17. **COPY OF WRITING**.—The court cannot compel the defendant in a criminal prosecution to produce an instrument in writing, in his possession, to be used in evidence against him. *McGinnis v. The State*..... 500
18. **LARCENY—PROOF OF CONTENTS OF BANK NOTES**.—On the trial of a prosecution for the larceny of bank notes, or other written instruments, where the stolen property is alleged to be in the possession of the accused, parol evidence may be given of the contents of the notes or writings, without notice to the accused to produce them.....*Ibid*.
- Williams v. The State*, 16 Ind. 461, overruled.....*Ibid*.
19. **FELONY—COMMON PLEAS**.—On the trial of an information for grand larceny, in the Court of Common Pleas, no evidence was

given to show that the defendant had not been indicted in the Circuit Court for the offense, but it did appear in evidence that the case was tried on the next day after the commission of the offense.

Held, that this court will take official notice that the Circuit Court could not have been in session between the commission of the offense and the trial..... *Ibid*.

D

DAMAGES.

See CONTRACT, 4.

1. A party is liable for the damages which are the proximate result of his violation of his contract; but the other party is bound to use due diligence in preventing loss. *Cincinnati & Chicago Air Line R. R. Co. v. Rodgers*..... 108
2. TROVER—MEASURE OF DAMAGES. The measure of damages in an action for the conversion of personal property, is the value of the property at the time of the conversion. *Fater et al. v. Mullen*..... 277
3. INJUNCTION BOND.—A having the right to the possession of certain real estate, under a purchase by title bond, was enjoined, at the suit of B, from exercising that right, and from entering upon the land. *Held*, that in a suit upon the injunction bond, A was entitled to recover for any injury to the possession, or to the land itself, caused by the injunction. *Winship et al. v. Clendenning*..... 439

DECEDENTS' ESTATES.

See EXECUTOR AND ADMINISTRATOR.

DEEDS.

Disaffirmance of by infant. See INFANCY, 2, 3, 4, 5, 6.

1. DEED—RECORD OF.—A executed to B a deed for certain real estate, which was not put on record for more than a year. After the making of the deed, but before it was recorded, C recovered a judgment against A, upon which D became

replevin bail, neither of them having any knowledge of the unrecorded deed, and D having entered himself as bail on the judgment in the belief that the land belonged to A. Suit by C and D to subject the land, alleging the insolvency of A. *Held*, that C acquired by his judgment no lien on the land, because A had then no interest in the land to which the judgment could attach, and the failure of B to put his deed of record could give to C no interest in, or lien on the land.

Held, also, that D could occupy no better position than the judgment plaintiff, and if the deed was valid against him, it was also valid against the replevin bail.

Held, also, that construing sec. 11 and 16 of the act concerning real property, 1 G. & H., 259, 260, together, they must be held to mean that a deed not recorded within ninety days is void only as to a person who has, without notice, in good faith, and for a valuable consideration, acquired a legal interest in the land. *Esseyen et al. v. McClellan et al.*..... 165

2. MASTERS IN CHANCERY.—Under the statute of 1836, masters in chancery had general authority to take the acknowledgment of deeds. *Gray v. Stiver et al.*..... 174

3. DEED OF INSANE PERSON.—The deed of a person of unsound mind, not under guardianship, conveys a seisin to the grantee: such deed being voidable only, and not void. *Somers et al. v. Pumphrey et al.*..... 231

4. WEAKNESS OF MIND.—Mere weakness of mind is not idiocy or insanity, nor does it amount to unsoundness of mind, within the meaning of the law, and such weakness is not enough, of itself, to avoid a deed..... *Ibid*.

5. FRAUD.—A deed procured by the fraud of the grantee is not void, but voidable only, and conveys a seisin, which, in the hands of an innocent purchaser, without notice, may become a good title..... *Ibid*.

6. INSANE PERSONS—CONTRACTS OF.—The deed of a person of unsound mind may be avoided by the grantor himself, or his legal representatives, though the estate may have

- passed into the hands of a *bona fide* purchaser for a valuable consideration.....*Ibid.*
7. **DEED—DELIVERY OF.**—Ordinarily, the question as to the delivery of a deed is one of fact, to be determined by the jury, but it may arise in a form to present only a question of law for the court, or it may present a mixed question of law and fact, in which case the jury determines the fact, and the court the law arising upon the facts as proved.....*Ibid.*
8. **SAME.**—The law does not prescribe any particular form of words or actions as necessary to constitute a delivery. Anything done by the grantor, from which it is apparent that a delivery is thereby intended, either by words or acts, or both combined, is sufficient.....*Ibid.*
9. **SAME.**—An actual delivery by the husband to the grantee, of a deed executed by the husband and wife, of the wife's land, will, in the absence of fraud, be deemed a delivery by the wife also.....*Ibid.*
10. **SAME—LEAVING DEED FOR RECORD.**—The leaving of a deed for record at the recorder's office, by the grantor, is at least a *prima facie* delivery to the grantee; such act being regarded by the law as an unconditional delivery to a third person for the use of the grantee *Ibid.*
11. **EVIDENCE—RECORD OF DEED.**—The record of a deed may be given in evidence without accounting for the absence of the original. *Winship et al v. Clendinning*.....489

DELIVERY.

Of Deed. See DEED.

By surety to principal, on condition to procure other surety. See SURETY, 2, 8.

DEMURRER.

1. **DEMURRER TO PART OF PARAGRAPH.**—Under our present practice, a demurrer will not lie to a part of a paragraph of a pleading, but, regarding each separate breach assigned in a complaint on an administrator's bond, taken in con-

- nection with the introductory averments, as a separate paragraph, containing a distinct cause of action, a demurrer may be properly filed to each breach. *Rene v. Tyson, Adm'r of Oldham*.....56
2. A judgment on a demurrer to a good answer is a bar to a subsequent suit for the same cause of action. *Wilson v. Ray*.....156
3. **COPY OF WRITTEN INSTRUMENT.**—The omission to file a copy of the written instrument upon which a pleading is founded may be taken advantage of by demurrer. *Seawright et al v. Coffman*.....414
4. Rulings upon demurrers to pleadings need not be assigned as reasons for a new trial. *Gray v. Stiver et al*.....174
5. The filing of a demurrer to an amended complaint counting upon a cause of action which accrued subsequent to the service of the summons, is a waiver of the right to a continuance. *Farrington v. Hawkins*.....253
6. **DEFECT OF PARTIES.**—If a defect of parties be not objected to by demurrer, or answer, the objection is waived. *Groves v. Ruby et al* 418

DESCENTS.

1. **EXECUTOR—RIGHT TO POSSESSION OF REAL ESTATE.**—Real estate, unless otherwise disposed of, goes to the heirs, and not to the executor, and a mere power given to the executor to sell real estate, does not give him a right to the possession thereof. To entitle him to such possession, the land, or its usufruct, must be expressly given to him by the will. *Eubottom v. Morrow, Adm'r, &c*..... 202
2. **STATUTE OF DESCENTS.**—*Martindale v. Martindale*, 10 Ind. 566, and *Oyle v. Stoops*, 11 *id* 880, affirmed. *Rockhill v. Nelson et al*..... 422

DILIGENCE.

Necessary to entitle party to rescission. See CONTRACT, 12.

DISCRETION.

Abuse of by lower court will be reviewed. See FRACTION, 84.

DIVORCE.

1. HUSBAND AND WIFE—DOMICIL. The general rule is that the domicile of the wife is determined by that of the husband. This rule results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. *Jenness v. Jenness*..... 355
2. DIVORCE—JURISDICTION.—But where there has been a final separation of husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of the wife, so as to confer, or oust, the jurisdiction in a suit for divorce....*Ibid.*
3. SAME—CROSS PETITION.—It is not necessary, under our statute, that the defendant, in an action for divorce, should be a resident of this state, in order to file his cross petition, and obtain the affirmative relief which it may authorize.....*Ibid.*
4. COMMON PLEAS COURTS—JURISDICTION.—The Courts of Common Pleas have jurisdiction of suits for divorce. *Ewing v. Ewing*..... 468
5. CODE.—The proceeding for divorce is so far special as to allow all the provisions of the divorce act to have their full force, unaffected by the code.....*Ibid.*
6. JURISDICTION—DIVORCE.—The residence of the plaintiff, and not that of the defendant, determines the jurisdiction in suits for divorce. Process may be served in any county in the state, and service by copy is personal service.....*Ibid.*
7. SAME—NEW TRIALS.—Section 99 of the code, which provides for relieving a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and section 356, which provides for granting a new trial within one year, on cause shown, do not apply to decrees for divorce.....*Ibid.*
8. ALIMONY—CUSTODY OF CHILDREN.—The order as to alimony and the custody of children, which is only an incident of the decree for divorce, can be modified or set

aside by a proceeding under section 7 of the act of March 4, 1859, (2 G. & H. 349, note,).....*Ibid.*

DOMICIL.

See HUSBAND AND WIFE, 3, 4.

DRAFT.

See SUBSTITUTE.

E.

ENTRY BOOK.

Where a mortgage is left for record with the recorder, and is entered by him in the entry book, as required by the statute, it must be deemed to be recorded from the date of its reception, as noted on the entry book, and no injury can result to any one from a failure of the recorder actually to record the instrument. *Kessler v. The State ex rel. Wilson*.....318

EQUITY.

Nothing undone will be looked upon in equity as done, but what ought to be done, nor except in favor of those who have a right to pray that it shall be done. *Hunter et al v. Bales*.....299

ESCROW.

See *Doerdtorf et al v. Foresman*.....481

ESTOPPEL.

1. GARNISHMENT.—Proceedings in attachment. Answer by the garnishee that he was not indebted to the attachment defendant. Reply, by way of estoppel, that the garnishee, before the suing out of the writ of garnishment, had admitted to plaintiff that he was indebted to the attachment defendant, and that, if garnished, he would pay the money to the plaintiff. *Held*, that the facts set up in the reply did not estop the garnishee from denying an indebtedness to the principal defendant. *Lewis v. Frematt et al*.....96
2. SAME.—To estop a minor from dis-

affirming a conveyance, on arriving at full age, some act must have been done, or there must have been some omission, after reaching majority, which would work injury to the person in possession under color of title, rendering the disaffirmance a fraud upon him. *Miles v. Linger-*

man.....385

3. MARRIED WOMAN—DISAFFIRMANCE OF DEED EXECUTED BY, DURING COVERTURE AND MINORITY.—Though under our present statute, a married woman may disaffirm a conveyance made by her during minority, and bring an action to recover the lands, without the assent, and even against the will of her husband, yet she will not be estopped from avoiding the conveyance merely by an omission, for any length of time, during her coverture, to disaffirm it, unconnected with any other circumstances. *Ibid.*

4. SAME.—An infant, being a *feme covert*, joined with her husband in the conveyance of her land to A, who, subsequently, without her knowledge, conveyed it to B. Near ten years after attaining to full age, being still *covert*, she gave notice to B of her intention to avoid the deed, and commenced an action to recover possession of the land. Some slight improvements had been made upon it after she conveyed it, of which, however, she knew nothing. She had resided within four miles of the land for two years after she arrived at full age, and within ten miles of it up to the time of trial.

Held, that she was not estopped by these circumstances from asserting title to the land.....*Ibid.*

EVIDENCE.

Proving foreign statute. See USURY.

1. Where there is a clear conflict in the evidence, the Supreme Court will not disturb the finding below. *Trinler v. Cornelius*..... 97

2. SALE OF LIQUOR TO MINOR—EVIDENCE.—In a prosecution for selling intoxicating liquor to a minor, the defendant asked the prosecuting witness to whom the liquor was

alleged to have been sold, whether he had not voted at the general elections for two years past.

Held, that the evidence sought by the question was proper: 1st. To impeach the statement of the witness that he was a minor; and, 2d, as tending to show that the defendant sold the liquor in the *bona fide* belief that the party was of age. *Brown v. The State*..... 113

3. TENDER.—The tender of an amount of money in discharge of a debt is an admission of the amount due, but is not conclusive, and if too much has been tendered, no obligation is created to pay or keep good the whole amount tendered. *Abel v. Opel et ux*.....250

4. RECORD.—A properly certified copy of an affidavit which had been filed in the Supreme Court, as the basis of a motion to reinstate a case which had been dismissed, was given in evidence against the party who had made it, in an action in the lower court.

Held, that as the affidavit was not connected with the case on trial by other evidence, it was irrelevant, and as it could properly have had no influence in the case, it will be presumed that it had, in fact, none.

Held, also, that as it did not appear that any motion was made upon the affidavit to reinstate the case, and as the case dismissed was no longer *in fieri*, the affidavit was not the fragment of a record, but an isolated paper. *Thom et al. v. Wilson's Executor*..... 323

5. RECORD OF DEED.—The record of a deed may be given in evidence without accounting for the absence of the original. *Winship v. Clendenning*..... 439

6. RECEIPT.—When a package of money, in a sealed envelope, is received by a common carrier for transportation, and a receipt is given, reciting that the package is "said to contain" a given amount, the recital is not *prima facie* evidence that the package did, in fact, contain the amount named. *Fitzgerald v. The Adams Express Company*..... 447

7. CRIMINAL LAW—COPY OF WRITING.—The court cannot compel the

- defendant in a criminal prosecution to produce an instrument in writing, in his possession, to be used in evidence against him. *McGinnis v. The State*..... 500
8. LARCENY—PROOF OF CONTENTS OF BANK NOTES.—On a trial for the larceny of bank notes, or other written instruments, where the stolen property is alleged to be in the possession of the accused, parol evidence may be given of the contents of the notes or writings, without notice to the accused to produce them.....*Ibid.*

EXECUTION.

1. LEVY.—After an execution in the hands of the sheriff has been levied on property, he has a right to proceed with the collection thereof, until legal steps are taken to arrest his action in the premises, and he is not bound to take even the receipts of the judgment plaintiff. *Kirkland v. Robinson et al.*.....105
2. SHERIFF'S POUNDAGE.—Where the judgment defendant, for the purpose of inducing the attorney of the judgment plaintiff to accept the money, promises to pay the costs, the sheriff is entitled to his poundage.....*Ibid.*
3. EXEMPTION.—Where property is claimed by an execution debtor as exempt from sale under executions then in the hands of the sheriff, and is set off to him as exempt, it is relieved from the lien of the executions. *Hall et al v. Hough*...278
4. SALE ON INSUFFICIENT NOTICE.—A sale of personal property on execution, to the execution creditor, on a notice of but nine days of the time and place of sale, is void. *Keen et al. v. Preston et al.*.....395

EXECUTORS AND ADMINISTRATORS.

1. RENTS.—The administrator of a deceased tenant cannot, by selling and assigning the lease, relieve himself from the obligation to pay rent accruing subsequent to the death of his intestate. *Carley v. Lewis et al.*.....23
2. EXECUTOR'S BOND—LIABILITY OF SURETY.—The surety on the orig-

inal bond of an executor is not liable for the misappropriation of money received from the sale of real estate, unless such sale was directed by the will. *Rose v. Tyson, Adm'r of Oldham*.....56

3. SUIT TO SET ASIDE REPORT.—Suit by a legatee against the administrator, and a creditor of the estate, alleging that the administrator had fraudulently allowed and paid the creditor's claim, knowing it to be unjust, and that by such payment the assets of the estate would be so reduced as to be insufficient to pay plaintiff's legacy. Prayer, that the allowance of the claim, and the report thereof by the administrator, be set aside, and the plaintiff allowed to contest the claim.

Held, that the plaintiff showed a sufficient interest to enable him to sue. *Held*, also, that as the relief sought could not have been obtained by an appeal from the order of the court allowing the claim, the remedy sought was an appropriate one. *Boil's Adm'r et al v. Ayers et al.*...32

4. LIABILITY FOR LOSS BY FIRE.—An administrator must be held to adopt such precaution against the loss of property by fire, as prudent men are, under similar circumstances, accustomed to exercise. *Rubottom v. Morrow's Adm'r*.....202

5. SAME.—RENTS OF REAL ESTATE.—Ordinarily, an administrator is not chargeable with the rents of real estate accrued during his administration.....*Ibid.*

6. EXECUTOR.—RIGHT TO POSSESSION OF REAL ESTATE.—Real estate, unless otherwise disposed of, goes to the heirs, and not to the executor, and a mere power given to the executor to sell real estate, does not give him a right to the possession thereof. To entitle him to such possession, the land, or its usufruct, must be expressly given to him by the will.....*Ibid.*

7. That an administrator can neither read nor write is not good cause for his removal. *Gregg v. Wilson, Adm'r, &c.*.....227

8. WITNESS.—In a suit against an executor, upon a contract made with the testator, where the judgment, if the plaintiff should recover,

- er, must go against the testator's estate, the executor is not a competent witness, unless called to testify by the opposite party, or by the court. *Thom et al v. Wilson's Ex'r*.....828
9. ADMINISTRATOR'S BOND.—A suit may be maintained on the bond of an administrator, joint and several in its terms, against one or all of the obligors. *The State ex rel McNeal et al v. Bennett et al*.....883
10. SAME.—The heirs at law of an intestate may sue upon the bond of the administrator, to recover for assets converted by the administrator to his own use, and for which he has failed to account.....*Ibid*.
11. SAME.—SUIT AGAINST A SURETY. In a suit against a surety on the bond of an administrator, the breach alleged in the complaint was that there had come to the hands of the administrator, assets of the value of, &c., which he had converted to his own use, and wholly failed to account for. *Held*, that the breach was sufficient.*Ibid*.

EXEMPTION.

Where property is claimed by an execution debtor as exempt from sale under executions then in the hands of the sheriff, and is set off to him as exempt, it is relieved from the lien of the execution. *Hall et al v. Hough*278

EXPRESS COMPANIES.

See COMMON CARRIERS.

F

FELONY.

See CONTRACT, 2. *See* CRIMINAL LAW.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

See RAILROADS, 3, 4, 5, 6, 7.

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FIXTURES.

- A erected a mill upon land owned by B, under a parol contract that if B should pay off a certain judgment which was a lien on the land, and should then convey to A an undivided half of the land, he, B, should become the owner of one-half of the mill. Until the judgment was paid, the mill was to remain the individual property of A. B failed to pay the judgment, and the land was sold upon an execution issued thereon. *Held*, that after the sale of the land on the execution, the mill, though standing upon the land, was the personal property of A, who had a perfect right to remove it from the land.
- Held*, also, that A had acquired no interest in the land as a purchaser, and his right to remove the mill did not depend upon the law in relation to fixtures erected by him as tenant, but upon the contract by virtue of which he acted. *Yater et al v. Mullen*..... 277 ✓

FORMER RECOVERY.

1. A judgment on a demurrer to a good answer, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action. *Wilson v. Ray*.....156
2. NEW MATTER.—That new matter is introduced in the second suit does not prevent the former recovery from operating as a bar, to the extent of the points involved in the former case.....*Ibid*.

FORWARDERS.

See COMMON CARRIERS.

FRAUDS, STATUTE OF.

1. Statutes against fraud cannot, as a general rule, be pleaded to protect a fraud. *Gray v. Stier et al*.....174
2. A took from B a chattel mortgage, which he failed to have recorded within ten days after its execution. B sold the mortgaged property to C, and took his note for the price. Subsequently, C agreed with A, orally,

to surrender the property to him, if he would take up and deliver to him, C, the note given by him to B. A, in pursuance of the agreement, took up the note, and tendered it to C, who refused to surrender the property. Suit by A to recover the value of the property.

Held, that the contract between A and C was not a contract of sale, but an agreement on the part of C to waive his claim, and allow A's mortgage to take effect upon the property, and, hence, was not within the statute of frauds. *Clark v. Day-ley*.....271

3. **CONTRACT. — WILL.** — A agreed orally with B, in consideration that the latter would continue to live with him as a laborer on his farm, that, in addition to the usual wages for such labor, he would leave to B, in his last will, the sum of \$500. Suit by B against the executors of A, alleging that he had continued to live with, and labor for, A, up to the time of his death, and that A had failed to make the promised provision in his will.

Held, that the agreement was not affected by the statute of frauds, 1st, because it had been performed by B; and 2d, because it was such an agreement as might have been performed within one year, by the death of A. *Bell v. Hewitt's Executors*.....280

FRAUD.

Effect of, where contract is separable.
See CONTRACT, 19.

1. A took a conveyance of lands from his brother-in-law, B, for a consideration equal to only one-half of their value, and was informed, at the time, of the intention of B to avoid the payment of a debt then in suit, upon which judgment was afterward recovered.

Held, that the transaction must be regarded as fraudulent. *Bray v. Hussey*.....228

2. **DEED.** — A deed procured by the fraud of the grantee is not void, but voidable only, and conveys a seisin, which, in the hands of an

innocent purchaser, without notice, may become a good title. *Sumers et al. v. Pumphrey*.....221

3. **RESCISSIOW.** — It is a general rule that a contract will not be rescinded, even for fraud, unless the contracting parties can be put in statu quo, nor then, unless the application for a rescission be made within a reasonable time. *Pattin v. Stewart*.....232

4. **SAME. — DILIGENCE.** — A party who seeks the aid of the court to compel the rescission of a contract, for fraud, must show that he has exercised at least reasonable diligence in ascertaining the facts, if readily within his power, and that he has been prompt in seeking his remedy, after the facts constituting the fraud were discovered. The relief is granted to the vigilant, but denied to the negligent. *Id.*

G.

GAMING.

GAMING CONTRACT. — A contract for the sale of property intended to be used for the purpose of gaming is not void under the statutes of Indiana, though the seller at the time of sale was informed of the purpose to which the property was to be applied. *Wickel v. Shattuck*.....1

GARNISHMENT.

See ATTACHMENT.

GIFT.

An executed gift from husband to wife cannot be revoked. *Raymond et al. v. Pritchard*.....218

GRAND JURY.

1. **CONSULTATION.** — The consultations of the grand jury are, by law, secret, and it is not competent to inquire into the amount of evidence on which they acted. *Stewart v. The State*.....162

2. **INSTRUCTIONS TO.** — It is the duty of the court to instruct the grand jury, but a failure to do so does not affect the validity of their presentments. *Id.*

3. **INDICTMENT.** — To an indictment the defendant pleaded, 1st, that it

had been found by the grand jury without evidence; and 2d, that no vote was taken by the grand jury.
Held, that the pleas were correctly rejected.
Held, also, that the return of a bill into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding, which cannot be controverted by plea. *Creek v. The State*.....151

GUARDIAN AND WARD.

See PARTIES, 2, 4.

H.

HIGHWAYS.

1. PRACTICE—AMBIGUOUS CURIA.—On the filing of the report of the viewers before the commissioners, in a proceeding for the location of a highway, A appeared as a friend of the court, and asked to file the dismissal of one of the petitioners, and to show by affidavit that another of the petitioners was not a resident of the county.
Held, that as A was not a party to the record he had no right to be heard in the case at that time. *Little v. Thompson*146
 2. PETITION FOR.—JURISDICTION OF BOARD.—On the trial, in the Circuit Court, of an application for the location of a highway, the defendant filed the affidavit of one of the petitioners that he was not a resident of the county at the time of signing, &c., and moved the court to dismiss the cause, on the ground that twelve resident freeholders of the county had not signed the petition.
Held, that as the objection did not appear on the face of the petition, it should have been presented by plea in abatement, and not by motion; and even if raised by plea it would have been too late, under sec. 54, 2 G. & H., 81.
Held, also, that before a county board can take jurisdiction of an application for the location of a highway, it must appear, 1st, that notice

of the application has been given; 2d, that twelve freeholders of the county have signed the petition; and 3d, that six of the petitioners are of the immediate neighborhood of the road.

Held, also, that any one interested may appear and contest any of these jurisdictional facts, but the finding and judgment of the board upon these points, when entered of record, is conclusive in such case.
Held, also, that the dismissal of the petition, by one of the twelve petitioners, will not oust the jurisdiction after it has once attached. *Ibid*.

3. RAILROADS.—FENCES.—The fact that a public highway runs along the side of a railroad track does not, of itself, show a valid reason why a fence could not be maintained between the highway and the track, but rather shows the stronger reason why the railroad should be fenced. *Ind. & Cia. E. R. Co. v. McKinney*283
 4. REMONSTRANCE.—It is not necessary, under our statute, that the persons remonstrating against the location, vacation, or change of a highway, should reside immediately on the line of the highway to be located, vacated or changed, but it is enough if they reside in the vicinity, or within such reasonable distance thereof that they would be affected thereby, in their convenience of travel, or otherwise. *Wilson et al. v. Whitel*206
 5. PRACTICE.—Where a remonstrance against the location, change, or vacation of a highway, has been received and acted upon by the board of commissioners, without objection, it is too late, after the case has been taken by appeal to the Circuit Court, to object that the remonstrants were not persons residing along the proposed highway. *Ibid*.
 6. APPEAL.—The viewers appointed to review a proposed change in a highway, against which a remonstrance had been filed, reported in favor of the proposed change, provided the petitioners would, at their own cost, put the new route in as good condition as the old, otherwise against the change. The board of commissioners thereupon ordered

that when the condition mentioned in the report of the viewers should be complied with, the new route would be established as a public highway. At a subsequent session of the board, one of the original petitioners filed his petition, alleging that the condition had been complied with, and asking that the new route be accepted and established, and, thereupon, the board ordered that the new route be established and kept in repair as a public highway. Within thirty days after this last order, the remonstrants appealed to the Circuit Court.

Held, that the appeal was taken in time.

Held, also, that the viewers had no authority to make their report in favor of the utility of the road dependent upon the opening of the road by the petitioners.....*Ibid*.

7. PUBLIC UTILITY.—In determining whether a proposed highway will be of public utility, though it is necessary to consider the wants of the particular neighborhood which desires it, yet the interests of the community outside of such neighborhood ought not to be disregarded. *Crossley et al. v. O'Brien et al.*.....325

8. SAME.—That cannot be deemed a highway of public utility which, if established, would render unfit for use another of much greater importance, (as, for example, an important line of railway,) or make the transit of passengers upon the latter seriously dangerous.....*Ibid*.

9. SAME.—Even if the ground used for a railway owned by a private corporation might be appropriated, in whole, or in part, for a common highway, under the right of eminent domain, yet it cannot be thus appropriated without being paid for.....*Ibid*.

10. UTILITY—DAMAGES.—In deciding whether a proposed highway will be of public utility, the damages which, if it were established, would have to be paid for the land appropriated, ought to be taken into consideration.....*Ibid*.

11. SAME—APPEAL.—On a petition to the county board for a highway,

viewers were appointed, who reported that the road would not be of public utility, and assessed damages in favor of certain of the persons through whose lands it would pass. The board decided that the road should not be established, unless the petitioners would pay such damages. The petitioners then took an appeal to the Court of Common Pleas.

Held, that under section 26 of the highway act, (1 G. & H. 364,) the appeal would lie.....*Ibid*.

12. PRACTICE.—In a proceeding to establish a highway, an objection that the names of the persons through whose lands it will pass are not sufficiently denoted in the petition, is waived if not made before the appointment of viewers, especially if not made by such persons themselves.....*Ibid*.

13. INCLOSURES.—If the viewers appointed to lay out a highway find an "inclosure" on the route petitioned for, the owner of which will not consent that the road shall be located through it, and they ascertain that a good route for a road can be otherwise had, they cannot locate the road through such inclosure; nor can they locate it upon such other route, if such route would be an essential departure from the route mentioned in the petition.....*Ibid*.

14. SAME.—When the report of the viewers is silent concerning such an inclosure, it will be presumed that there is none, or that the owner has given the consent required.....*Ibid*.

15. PRACTICE.—When the case has been appealed and tried by a jury, and a general verdict has been rendered for the petitioners, the same presumption will be entertained.....*Ibid*.

16. INCLOSURES.—Where inquiries whether a highway would be of public utility, and what damages, if any, should be allowed, were submitted to the jury, but the remonstrants did not ask that any question touching inclosures should be submitted,

Held, that no such question could be afterward raised.....*Ibid*.

17. **SAME—JURISDICTION.**—The course of proceeding required by the statute when inclosures interfere, is not pre-requisite to the jurisdiction of the county board to establish a highway.....*Ibid.*
18. **SAME.**—Jurisdiction will not be deemed to have been acquired by the county board to establish a highway, unless the facts necessary to give the jurisdiction appear affirmatively on the record.....*Ibid.*
19. **SAME—PRESUMPTION.**—But when the jurisdiction has been obtained, the same presumption will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction *Ibid.*
20. **NOTICE OF PETITION.**—Where a petition for the location of a highway has been received and acted upon by the board of commissioners, without objection to the sufficiency of the notice, it is too late, after the case has been appealed, to object to the notice. *Smith et al. v. Alexander et al.*..... 454
21. **PRACTICE.**—If the public utility of a proposed highway is not put in issue by the remonstrance, but a claim for damages only is presented, the utility of the highway is admitted, and the reviewers have only to report upon the claim for damages.....*Ibid.*
22. **SAME.**—When a person, not a party to the original remonstrance, is permitted in the Circuit Court to become a party, he occupies the same relation to the proceedings as the original remonstrants.....*Ibid.*

HUSBAND AND WIFE.

See SPECIFIC PERFORMANCE, 1.

1. **DELIVERY OF DEED.**—An actual delivery by the husband to the grantee, of a deed executed by the husband and wife, of the wife's land, will, in the absence of fraud, be deemed a delivery by the wife also. *Somers et al. v. Pumphrey et al.*..... 231
2. **TITLE BOND—GIFT.**—A sold certain real estate to B for \$300, the price to be paid in labor. At the request of B, A executed to the wife of B a title bond, conditioned for

the conveyance of the property to her, on payment of the price. Suit by the wife for a specific performance, alleging that about \$250 of the purchase money had been paid by the labor of the husband, and offering to pay the residue in money, when the amount should be ascertained.

Held, that a husband may give real estate to his wife, whether his title be an absolute fee, or merely a right in equity, and the equitable estate of B having, in this case, passed by an executed gift to the wife, she was entitled to enforce a specific performance of the bond.

Held, also, that after having made and executed the gift, it was not in the power of the husband to revoke it.

Held, also, that the consideration of a contract need not have moved from the party in whose favor it was made, and who seeks to enforce it. *Raymond et al. v. Pritchard*.....318

3. **DOMICIL.**—The general rule is that the domicile of the wife is determined by that of the husband. This rule results from the legal identity of husband and wife, constituting them one person in law, and from her duty to dwell with him. *Jenness v. Jenness*..... 355

4. **DIVORCE—JURISDICTION.**—But where there has been a final separation of husband and wife, and they have their actual permanent residence in different states, the domicile of the husband cannot be regarded as fixing that of the wife, so as to confer, or oust, the jurisdiction in a suit for divorce.....*Ibid.*

5. **MARRIED WOMAN—DISAFFIRMANCE OF DEED EXECUTED BY, DURING MINORITY.**—Though, under our present statute, a married woman may disaffirm a conveyance made by her during minority, and bring an action to recover the lands, without the assent, and even against the will of her husband, yet she will not be estopped from avoiding the conveyance merely by an omission, for any length of time, during her coverture, to disaffirm it, unconnected with any other circumstances. *Miles v. Lingerman*.....385 ✓

6. **SAME.**—An infant, being a *feme covert*, joined with her husband in the

conveyance of her land to A, who, subsequently, without her knowledge, conveyed it to B. Near ten years after attaining to full age, being still *covert*, she gave notice to B of her intention to avoid the deed, and commenced an action to recover possession of the land. Some slight improvements had been made upon it after she conveyed it, of which, however, she knew nothing. She had resided within four miles of the land for two years after she arrived at full age, and within ten miles of it up to the time of trial.

Held, that she was not estopped by these circumstances from asserting title to the land.....*Ibid*.

7. **BASTARDY.**—A married woman may prosecute an action for bastardy, and is a competent witness to prove non-access by the husband. *Cuppy v. The State ex rel Grantham*.....389

8. **RESULTING TRUST.**—A conveyance having been made in 1835, to husband and wife, the husband, in 1850, executed a deed, which, after reciting that the land had been purchased with the money of the wife, purported to convey and limit the descent of the land, on the death of him and his wife, to A, B and C, the children of the wife, to the exclusion of his children by a former marriage. Afterward, the husband and wife joined in conveying separate parcels of the land to A, B and C.

Held, that the husband held the land only as a trustee for his wife.

Held, also, that the several conveyances to A, B and C were valid. *Noble v. Morris*.... 478

I.

IMBECILITY.

See INSANITY, 3.

INDICTMENT.

See CRIMINAL LAW.

1. **RETAILING.**—**LIQUOR LAW.**—In an indictment for retailing liquor without a license, it is sufficient to charge that it was intoxicating li-

quer, and that the quantity sold was less than a quart, without averring the kind, or exact quantity sold. *The State v. Moody*.....268

2. **RECORD OF.**—An indictment becomes a part of the record when filed, without any further action of the court. *Stewart v. The State*.....142

3. **GRAND JURY.**—It is the duty of the court to instruct the grand jury, but a failure to do so does not affect the validity of their presentments.*Ibid*.

4. **RETURN OF.**—To an indictment the defendant pleaded, 1st, That it had been found by the grand jury without evidence; and 2d, That no vote had been taken by the grand jury.

Held, that the return of a bill into court by the grand jury, duly indorsed by the foreman, is evidence that the proper number have concurred in the finding, which cannot be controverted by plea. *Creek v. The State*.....151

INFANCY.

1. **INFANCY—NON-FRANCHISE.**—A and B entered into a partnership with C, who was an assistant quartermaster of the United States, by which they were to furnish forage for the use of the army, which was to be purchased of the firm, and inspected and received by C, as such quartermaster. At a settlement of the business, the profits of each partner being \$1800, B, in whose hands they were, paid over to C the share of A, to be delivered to him by C. Suit by A, alleging a conversion of the money by C.

Held, that a plea of infancy by C was good, as the bailment was of money generally, and not of specific bills or coins, and the failure to pay over was only a non-feasance. *Reed v. Stevenson's Adm'r*.....115

2. **INFANT-DISAFFIRMANCE OF DEED BY.**—One who has disaffirmed a conveyance made during infancy is not required to tender back the purchase money to support an action to recover possession of the land. *Miles v. Lingermeier*..... 385

3. **SAME.**—The circumstance that land conveyed to an infant has subse-

quently been sold by the grantee, to a person who did not know of the disability, will not, of itself, prevent the minor from disaffirming the same.....*Ibid.*

4. **SAME—ESTOPPEL.**—To estop the minor from disaffirming a conveyance, on arriving at full age, some act must have been done, or there must have been some omission, after reaching majority, which would work injury to the person in possession under color of title, rendering the disaffirmance a fraud upon him.....*Ibid.*

5. **MARRIED WOMAN—DISAFFIRMANCE OF DEED EXECUTED BY, DURING MINORITY.**—Though, under our present statute, a married woman may disaffirm a conveyance made by her during minority, and bring an action to recover the lands, without the consent, and even against the will of the husband, yet she will not be estopped from avoiding the conveyance merely by an omission, for any length of time, during her coverture, to disaffirm it, unconnected with any other circumstances *Ibid.*

6. **SAME—ESTOPPEL.**—An infant, being a *feme covert*, joined with her husband in the conveyance of her land to A, who subsequently, without her knowledge conveyed it to B. Near ten years after attaining to full age, being still *covert*, she gave notice to B of her intention to avoid the deed, and commenced an action to recover possession of the land. Some slight improvements had been made upon it after she had conveyed it, of which, however, she knew nothing. She had resided within four miles of the land for two years after she arrived at full age, and within ten miles of it up to the time of trial.

Held, that she was not estopped by these circumstances from asserting title to the land.....*Ibid.*

INFORMATION.

See CRIMINAL LAW, 1, 19.

MURDER.—In an information in the Court of Common Pleas for murder, the prosecuting attorney informed the court that A B was in custody,

and confined in jail, on a charge of felony, without indictment, &c., "said charge being described as follows:" A description of murder in the second degree followed, but the information contained no direct averment that the defendant had committed the crime.

Held, that the information was bad.
Flinn v. The State..... 286

INJUNCTION.

1. **PRACTICE.**—Where a restraining order has been granted upon a complaint duly verified by affidavit, and an amended complaint is afterward filed, the objection that the latter is not supported by affidavit cannot be raised by demurrer. *Hall et al. v. Hough*.....278

2. **NUISANCE.**—The statute provides for an action in favor of any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, and, where a proper case is made, the nuisance may be enjoined or abated, and damages recovered. *Smith v. Fitzgerald*.....316

3. **Restraining orders and injunctions** may be granted, under our statute, whenever it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great injury to the plaintiff.*Ibid.*

4. *See* *Evring v. Baitner*.....409

5. **INJUNCTION BOND.**—An injunction bond was entitled "State of Indiana, Clinton county, A v. B."

Held, that the bond was not void for the failure to state the name of the court in which the action was brought. *Winship et al. v. Clendenning*.....459

6. **PRACTICE.—SUIT ON INJUNCTION BOND.**—In an action upon an injunction bond, it is not necessary that a copy of the proceedings and judgment in the injunction case should be filed with the complaint.....*Ibid.*

7. **SAME.—DAMAGES.**—A having the right to the possession of certain

real estate, under a purchase by title bond, was enjoined, at the suit of B, from exercising that right, and from entering upon the land.

Held, that in a suit upon the injunction bond, A was entitled to recover for any injury to the possession, or to the land itself, caused by the injunction.....*Ibid*.

8. **SAME.**—An injunction having been granted, to continue until the determination of a case in the Supreme Court, the latter case was subsequently dismissed, but the appeal was afterward "reinstated," and the case decided upon its merits.

Held, that it must be understood from the record, that the dismissal of the case in the Supreme Court was set aside and the case reinstated, and this being the case, the injunction was continued in force, and, in an action upon the injunction bond, damages accruing after the dismissal could be recovered....*Ibid*.

INJURY TO ANIMALS.

See RAILROADS.

INN KEEPER.

LIABILITY OF.—Suit against the keeper of an inn, to recover the value of a watch lost by the plaintiff while a guest at the inn. There was evidence of negligence on the part of the plaintiff, but there was also evidence from which it might have been inferred that the watch was stolen by a servant of the inn keeper.

Held, that if the larceny was committed by his servant, the defendant was liable, and, after a finding for the plaintiff, it must be presumed, in support of it, that the fact was found to be that the loss resulted from the larceny of the servant. *Huntington et al. v. Drake*..... 847

INSANITY.

1. **DEED OF INSANE PERSON.**—The deed of a person of unsound mind, not under guardianship, conveys a seisin to the grantee; such deed being voidable only, and not void. *Somers et al. v. Pumpkrey et al.*.....281

2. **WEAKNESS OF MIND.**—Mere weakness of mind is not idiocy or insanity, nor does it amount to unsoundness of mind, within the meaning of the law, and such weakness is not enough, of itself, to avoid a deed.....*Ibid*.

3. **IMBECILITY.**—Imbecility of mind is not sufficient to set aside a contract, where there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him.....*Ibid*.

4. **INSANE PERSONS.—CONTRACTS OF.** The deed of a person of unsound mind may be avoided by the grantor himself, or his legal representatives, though the estate may have passed into the hands of a *bona fide* purchaser for a valuable consideration.....*Ibid*.

INSTRUCTIONS.

1. **EXCEPTIONS TO.**—Exceptions to instructions given, or refused, by the court, may be taken either by the attorney writing at the close of each, "given (or refused) and excepted to," and signing it, or by a general bill of exceptions, and when neither of these methods is resorted to, the instructions make no part of the record, and will not be noticed. *Newby v. Warren*.....161

2. **SAME.**—When the words "given (or refused) and excepted to" are written after the instruction, and signed by the judge, instead of the attorney, the exception is not properly reserved.....*Ibid*.

3. Instructions based on a hypothetical case, where there is no evidence tending to make the case supposed, are out of place, and ought not to be given, as they are only calculated to mislead the jury. *Swank v. Nichols' Adm'r*.....199

4. It is error for the court to give to the jury instructions which are inconsistent with each other, and

which leave the jury in doubt which to believe. *Somers et al. v. Pumpley*281

INSURANCE.

FOREIGN COMPANIES.—Section 56 of an act entitled “an act for the incorporation of insurance companies, defining their powers and prescribing their duties,” (1 G. & H. 398,) which purports to regulate the agencies of foreign insurance companies doing business in this state, is unconstitutional, because the subject of the section is not embraced in the title of the act, and is not matter properly connected with the subject expressed in the title. *Grubbs v. The State*..... 296

INTEREST.

See USURY.

After Verdict. See PRACTICE, 52.

INTEREST AFTER TENDER—After the obligee in a title bond tenders the purchase money and all interest accrued, and demands a conveyance, he is not chargeable with interest, unless he has used the money, and it is incumbent on the vendor to prove such use. *Hunter et al. v. Bales*.....299

J

JUDGE.

1. **JUDGE PRO TEMPORE.**—The record of an appeal from a Court of Common Pleas showed that the judge of the court, being unable to attend at the term at which the judgment was rendered, appointed J. S., “a suitable person, and a member of the bar of the State of Indiana, and an attorney of said court,” to hold the court for him.

Held, that the words used to describe the person appointed to hold the court, sufficiently show a compliance with the statute, which requires such appointee to be “a regular practicing attorney of the State.” *Brown v. Busan*.....194

2. **SAME.**—The act authorizing the appointment of a judge *pro tempore*, to hold the Court of Common Pleas, in the absence of the regular judge, is constitutional.....*Ibid.*

3. **SAME.**—Where a person other than the regular judge has tried a cause below, and no objection was made on the trial to his authority, and the record is silent on the subject, such objection cannot be raised for the first time in the Supreme Court. *Mitchell v. Smith*..... 252

JUDGMENT.

1. **PLEADING—FORMER RECOVERY.** A judgment on a demurrer to a good answer, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action. *Wilson v. Ray*..... 166.

2. **SAME.**—That new matter is introduced in the second suit does not prevent the former recovery from operating as a bar, to the extent of the points involved in the former case.....*Ibid.*

3. **REPLEVIN—SUIT ON BOND.**—Where the right of property has been tried in an action of replevin, it becomes *res adjudicata*, and cannot, nor can any other issue tried and determined in such suit, be again put in issue in an action on the replevin bond. *Denny v. Reynolds et al*..... 248

4. **APPLICATION TO SET ASIDE JUDGMENT.**—Three days after the rendition of a judgment against him, the defendant appeared and moved to set aside the default and judgment, and filed affidavits in support of his motion. The affidavits disclosed that he had employed counsel to defend for him, and had caused a subpoena to issue for his witnesses; that he had been prevented from attending court himself by the dangerous illness of his wife, and that his attorney, being Provost Marshal of the district, had been so engaged in enforcing the draft, that he had been unable to attend the court, and had neglected to speak to any other attorney to represent him in the case. The affidavits also disclosed a meritorious defense to the action.

The court overruled the motion to set aside the judgment.
Held, that the motion to set aside the judgment should have been granted.
Held, also, that as the plaintiff appeared by attorney, no notice of the application to set aside the judgment was necessary. *Hill et al v. Crump*..... 291

JURISDICTION.

1. JUSTICE OF THE PEACE.—A suit before a justice of the peace against a sole defendant, who is a resident of this state, must be begun in the township where the defendant resides, if there is a justice in the township competent to try the cause, unless the proceedings are begun by *capias*. That the suit is by attachment, and that property has been attached in the township, does not give the justice jurisdiction. *Michael v. Thomas*.....72
2. RAILROADS.—INJURY TO STOCK.—Under the law of 1863, "to provide compensation to owners of animals killed" &c., (Acts 1863, p. 25,) all animals killed at any one time constitute a separate and indivisible cause of action, and two of these causes cannot be united to give jurisdiction to the Circuit Court. *The Ind. & Cin. R. Co. v. Kercheval*.....189
3. SAME.—Complaint in the Circuit Court, in two paragraphs, for stock killed at different times. The first paragraph was for a horse worth \$200, and the second for a cow worth \$50.
Held, that as to the second paragraph of the complaint the Circuit Court had no jurisdiction, as the value of the cow did not exceed \$50....*Ibid*.
4. TITLE TO REAL ESTATE.—The Circuit Court has, by statute, exclusive jurisdiction of all cases where the title to real estate is in issue, and, hence, an action to set aside a fraudulent conveyance, and subject land to the satisfaction of a judgment rendered by the Court of Common Pleas, must be brought in the Circuit Court. *Bray v. Hussey*.....228
5. JUSTICE.—In an action before a justice of the peace, the footing of the

account filed as the basis of the action was \$200, but a correct addition of the items charged was a fraction of a dollar more.

Held, that the footing, or sum stated on the account, must be taken to be the amount for which judgment was demanded, and, hence, the justice had jurisdiction. *Mitchell v. Smith*.....252

6. COMMON PLEAS.—The Court of Common Pleas has jurisdiction of an action brought upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the defendant to answer a charge of felony in the Circuit Court. *Hawkins v. The State ex rel Reed*.....288
7. JUSTICE OF THE PEACE.—FELONIES.—In cases of felony, justices of the peace have no power to try the accused, in any legal sense, but only to examine and hold to bail, or commit in default of bail....*Ibid*.
8. COUNTY BOARD.—Jurisdiction will not be deemed to have been acquired by the county board to establish a highway, unless the facts necessary to give the jurisdiction appear affirmatively on the record. *Cresley et al. v. O'Brien et al.*.....325
9. SAME.—PRESUMPTION.—But when the jurisdiction has been obtained, the same presumption will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction....*Ibid*.
10. COMMON PLEAS COURTS.—DIVORCE.—The Courts of Common Pleas have jurisdiction of suits for divorce. *Ewing v. Ewing*..... 468
11. DIVORCE.—The residence of the plaintiff, and not that of the defendant, determines the jurisdiction in suits for divorce.....*Ibid*

JURY.

Misconduct of. See NEW TRIAL, 2, 3.

1. WAIVER OF TRIAL BY JURY.—Any agreement of parties, entered of record, by which they consent to any disposition of the cause plainly inconsistent with its submission for a trial by jury, will constitute a waiver of the right to such a trial. *Goodwins v. Hedrick*.... 121

2. **SAME—REFEREE.**—The agreement to refer a cause, and that the referee shall hear the evidence, and try and determine all the matters in controversy between the parties, is totally inconsistent with its submission to a jury, and is a waiver of a jury trial.....*Ibid.*

JUSTICE OF THE PEACE.

Costs on appeal from. See **COSTS**, 3.

JURISDICTION.—A suit before a justice of the peace against a sole defendant, who is a resident of this state, must be begun in the township where the defendant resides, if there is a justice in the township competent to try the cause, unless the proceedings are begun by *capias*. That the suit is by attachment, and that property has been attached in the township, does not give the justice jurisdiction. *Michael v. Thomas*..... 72

2. **SAME.**—In an action before a justice of the peace, the footing of the account filed as the basis of the action was \$200, but a correct addition of the items was a fraction of a dollar more.

Held, that the footing, or sum stated on the account, must be taken to be the amount for which judgment was demanded, and, hence, the justice had jurisdiction. *Mitchell v. Smith*..... 252

3. **FELONY.**—In cases of felony, justices of the peace have no power to try the accused, in any legal sense, but only to examine and hold to bail, or commit in default of bail. *Hawkins v. The State ex. rel. Reed*..... 288

4. **RECOGNIZANCE.**—In a suit upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the accused to answer a charge of felony in the Circuit Court, the facts showing the authority of the justice to take the recognizance must be shown.....*Ibid.*

I.

LANDLORD AND TENANT.

See **FIXTURES**.

1. **COVENANT FOR RENT.**—A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. *Carley v. Lewis et al.*.....23

2. **SAME.**—The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee, and the lessor has his election either to sue the lessee on his covenant or to follow the land in the hands of his assignee. This rule is not changed by the statute of this state regulating the relation of landlord and tenant, (2 G. & H., sec. 17, p. 360).....*Ibid.*

3. **SAME.**—The administrator of a deceased tenant cannot, by selling and assigning the lease, relieve himself from the obligation to pay rent accruing subsequent to the death of his intestate.....*Ibid.*

LARCENY.

See **CRIMINAL LAW**, 18, 19.

LEVY.

See **EXECUTION**, 1.

LIEN.

See **EXECUTION, VENDOR AND PURCHASER**, 17.

Of Purchaser at Sheriff's sale for price paid. See **SHERIFF'S SALE**, 4.

LIMITATIONS.

1. **SUIT TO AVOID SHERIFF'S SALE.**—Sec. 211, 2 G. & H., 168, which enacts that actions for the recovery of real property sold on execution, brought by the execution debtor, his heirs, &c., must be begun within ten years after the sale, does not mean that a sheriff's sale shall be beyond question after the lapse of ten years, where the possession of the execution defendant has not been disturbed during that period, nor that after the sheriff's sale has

- been declared void by judicial determination, it shall yet be protected by the expiration of ten years from its date. *Gray v. Stiver et al.*.....174
2. **SAME.**—But where nearly twenty years have elapsed after the date of the sale, and during all that time the purchaser has been in adverse possession, the statute does apply, and is a bar to an action for the recovery of the land.....*Ibid.*
3. **SAME.**—It has been held by this court that the statute applies even where the court has not acquired jurisdiction over the persons of the owners of the land sold. Indeed, the statute would be useless, if it only protected titles which do not need protection.....*Ibid.*
4. **FRAUD.**—Statutes against frauds cannot, as a general rule, be pleaded to protect a fraud; but it is not so as to statutes of limitations, except in peculiar cases in equity.....*Ibid.*
5. **OFFICIAL BOND.**—Suit against A and his sureties, on a bond given by A as county treasurer. The complaint alleged that A, as such treasurer, had received the sum of \$2,000, which he failed, on request, to pay over to his successor in office.
- Held*, that as the suit was upon the bond, and not against the treasurer for money collected in his official capacity and not paid over, it was barred by the statute of limitations, after three years from the expiration of A's term. *Pickett v. The State ex rel Board of Commissioners, &c.*.....368
- LIQUOR LAW.**
1. **CONSTITUTION.**—Section 14 of the liquor law of 1859, (1 G. & H. 614,) which confers jurisdiction on the grand jury and Circuit Court for the trial of offenses arising under that law, is not within the prohibition of the constitution against special legislation, and is properly connected with the subject matter of the act, and embraced within its title. *Hingle v. The State*..... 85
2. **SALES ON SUNDAY.**—The act does not provide any penalty for sales of liquor made on Sunday, by a person having a license to sell, and, hence, though the license does not extend to sales made on that day, no prosecution will lie for such sales.....*Ibid.*
3. **SALE OF LIQUOR TO MINOR.**—If the defendant claims that the sale of liquor to a minor was made in the *bona fide* belief that he was an adult, the burden of proof is upon him to show facts which will justify the inference of such a belief. *Farback v. The State*.....77
4. **SAME.**—The statute prohibiting sales of liquor to minors was not intended to make the vender liable criminally, in cases where, upon the exercise of every reasonable precaution, he should be imposed upon as to the age of the buyer, and should sell to him in perfect good faith. *Rineman v. The State*.....80
5. **SAME—EVIDENCE.**—In a prosecution for selling intoxicating liquor to a minor, the defendant asked the prosecuting witness to whom the liquor was alleged to have been sold, whether he had not voted at the general elections for two years past.
- Held*, that the evidence sought by the question was proper: 1st. To impeach the statement of the witness that he was a minor; and 2d, as tending to show that the defendant sold the liquor in the *bona fide* belief that the party was of age. *Brown v. The State*.....113
6. **SAME—PARENT—Quere.**—Whether a parent can authorize another to sell liquor to his minor child, so as to shield the person selling from the penalty of the law. *Lower v. The State*.....131
7. **SALE TO MINOR.**—On the trial of an indictment for selling liquor to a minor, the evidence showed that the sales were made by the bartender, without the knowledge or consent of the defendant, either expressed or implied.
- Held*, that the evidence did not authorize a conviction.....*Ibid.*
8. **RETAILING—QUANTITY.**—In an indictment for retailing liquor without a license, it is sufficient to charge that it was intoxicating liquor, and that the quantity sold

was less than a quart, without averring the kind, or exact quantity sold. *The State v. Mondy*.....268

LITERARY INSTITUTION.

1. TAXATION.—EXEMPTION FROM.—

A building was erected upon a lot in *Indianapolis*, for the use of a literary and scientific institution, and the premises were kept and appropriated for that use, a corps of teachers being employed in instructing large numbers of pupils in ancient and modern languages, in the various sciences, and in the branches of education usually taught in colleges. The institution was conducted on private account, and the earnings were applied to the individual benefit of the proprietor.

Held, that under the act of 1861, the property was exempt from taxation. *City of Indianapolis v. Stardevant*.....391

2. *SAME*.—By the term "institution," as employed in said act, is meant a permanent establishment, in contradistinction to an enterprise of a temporary character.....*Ibid*.

LOST INSTRUMENT.

See PLEADING, 1.

M.

MADISON, CITY OF.

TAXATION.—The charter of the City of *Madison* provides that a tax for municipal purposes may be assessed upon all personal property owned by, or in the possession of, any inhabitant of the city, "except goods and produce for export, or in transit." A, being engaged in pork packing in said city, and having all of his capital invested in pork held for export, and in process of shipment to a foreign market, refused to return the same for taxation, and was thereupon assessed for "capital invested in pork, \$50,000," and taxes charged against him upon that sum.

Held, that the assessment was illegal, because the property, if taxable,

should have been assessed as pork, and not as "capital."

Held, also, that the pork, being "produce for export," was not subject to taxation under the city charter. *Fitch et al. v. The City of Madison*.....425

MANSLAUGHTER.

See CRIMINAL LAW, 9.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER IN CHANCERY.

Under the statute of 1836, masters in chancery had general authority to take the acknowledgment of deeds. *Gray v. Stiver et al*.....174

MISDEMEANORS.

See CRIMINAL LAW.

MISTAKE.

1. **MISTAKE OF LAW.**—A mistake purely of law is no ground of relief in equity, but it may be accompanied by such circumstances as will entitle the party to relief. *Curley v. Lewis et al*.....23

2. **NEGLIGENCE.**—Where there is no admixture of fraud or imposition in a transaction, and no taking unaware, or want of knowledge of the facts, save the fact of an error in calculation, of which the party complaining had doubts at the time, and was put upon inquiry, it would be encouraging negligence to relieve against the mistake. *Beaver et ux v. Trittipo*.....41

3. **MUTUAL ERROR.**—Mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract, and disappoints the intention of the parties by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment

of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, lays no foundation for equitable interference.....*Ibid.*

4. **MISDESCRIPTION OF LANDS.**—The lands conveyed by a mortgage were described as "the south-west quarter of section 31, township 4 north, range 11 east, and also the following tract, adjoining the above described tract on the west, to-wit: forty rods in width off the east side of the north-east quarter of section 33, township 4, of range 10 east, which said tract extends forty rods in width, as aforesaid, and from the north line to the south line of said last mentioned quarter-section."

Held, that the description is repugnant and impossible, if effect be given to all of its terms, as the north-east quarter of section 33, &c., cannot adjoin on the west the south-west quarter of section 31.

Held, also, that there were two descriptions of forty acres in the mortgage, either of which, taken alone, would be perfect, and it was evidently not intended to convey both. If both are equally certain, then both must be held void, but if one is less likely to be erroneous than the other, the court will adopt the former, to give effect to the conveyance.

Held, also, that there was less probability of mistake in that part of the description which described the second tract, forty rods in width, as "adjoining the former on the west," than in the description of the quarter section, by numbers, in which such forty acre tract was situated, and hence the court will give effect to the former, and reject the latter. *Gray v. Stiver et al.*.....174

5. **PARTIES.—PRIVIES.**—In all cases of mistakes in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors, or purchasers from them with notice of the facts. *Sample v. Howe et al.*.....208

MISTAKE SENSUS.

See SLANDER, I.

MORTGAGE.

1. **PRE-EXISTING DEBT.**—The mortgagee who takes a mortgage in good faith to secure a pre-existing debt, is entitled to be regarded as a purchaser for a valuable consideration, and to be protected as such. *Adcock et al. v. Jordan*.....14
2. **JUNIOR MORTGAGEE.**—The holder of a junior mortgage is not bound to pay off a prior incumbrance, unless he expressly agrees to do so.....14
3. **ASSIGNMENT OF DEBT.**—When more than one obligation is secured by a mortgage, each is considered a separate mortgage, and the assignment of one or more of such obligations will carry with it so much of the mortgage, and such assignee, if the assignment is made in good faith, and without notice, is regarded as a purchaser, and protected from an outstanding equity. *Sample v. Howe et al.*.....20
4. **RECORD OF MORTGAGE.—ENTRY BOOK.**—Where a mortgage is left for record with the recorder, and is entered by him in the entry book, as required by the statute, it must be deemed to be recorded from the date of its reception, as noted on the entry book, and no injury can result to any one from a failure of the recorder actually to record the instrument. *Kessler v. The State ex rel. Wilson*.....213

MULTIPLICITY OF SUITS.

See PRACTICE, 42

MURDER.

See CRIMINAL LAW, 3, 10, 11, 15

MUTUAL CLAIMS.

Not in judgment. See SET-OFF.

N.

NEGLIGENCE.

1. **RAILROADS.—INJURY TO AN-**

MALF.—The owner of a blind horse turned him out upon the common of a town, through which a railroad ran, where he was killed by a passing train. The injury did not occur on any street or alley, and the track was not fenced.

Held, that the owner was guilty of gross negligence, amounting to a willingness to suffer the injury complained of, and hence he cannot recover. *Knight, Adm'r of McKeehan v. Toledo & Wabash R. R. Co.*.....402

2. INJURY TO THE PERSON.—PLEADING.—In an action for an injury to the person, caused by the negligence of another, it must appear from the complaint, either by express averment, or by a particular showing of the facts, that the injury complained of occurred without the fault or negligence of the plaintiff. *Ev. & Crav. R. R. Co. v. Dexter*.....411

NEW TRIAL.

1. CUMULATIVE EVIDENCE.—Under our statute, a party to an action may testify in his own behalf, but he is not bound to resort to his own evidence, and may have a continuance for an absent disinterested witness to material facts, known to himself; but if he becomes a witness for himself, he stands as all other witnesses, except as to his credibility, and is not entitled to a new trial for newly discovered cumulative evidence of facts testified to by him on the trial. *Fox v. Reynolds*....46

2. SEPARATION OF JURY WITHOUT LEAVE.—*Somely*, that if after the jury have retired to deliberate on their verdict, some of them separate from their fellows, without the leave of the court, and without being attended by an officer, a new trial will not be granted, (unless our statute makes it imperative,) if the verdict is clearly right upon the evidence, but if the correctness of the verdict be doubtful, a new trial must be granted. But in all such cases, the misconduct being established, the burden is upon the prosecution to show that the offending jurors were not influenced adversely to the defendant, or in any respect rendered

less capable of discharging their duties. *Creek v. The State*.....152

3. QUERE.—Whether the statute (2 G. & H., sec. 142, p. 423,) does not make it imperative on the court to grant a new trial for such cause.*Ibid.*

4. ASSIGNMENT OF REASONS.—Any matter for which a new trial may be granted, as specified in sec. 352 of the code, must, in order to be available as error in the Supreme Court, have been made the foundation of a motion for a new trial in the court below. But rulings upon demurrers to pleadings are not within the rule. *Gray v. Steier et al.*....174

5. PRACTICE.—An application for a new trial, made after judgment, and at a subsequent term of the court, must be regarded as an independent proceeding, and if the application is made on the ground of newly discovered evidence, the evidence given at the trial, together with the newly discovered evidence, must be set out. *Huntington et al. v. Drake*.....347

6. DIVORCE.—Section 99 of the code, which provides for relieving a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and section 356, which provides for granting a new trial within one year, on cause shown, do not apply to decrees for divorce. *Ewing v. Ewing*.....468

NOTICE.

Of assignment of promissory note. See PROMISSORY NOTES, 2.

NUISANCE.

The statute provides for an action in favor of any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, and, where a proper case is made, the nuisance may be enjoined or abated, and damages recovered. *Smith v. Fitzgerald*..316

P

PARENT AND CHILD.

1. LIQUOR LAW.—Quere.—Whether

a parent can authorize another to sell liquor to his minor child, so as to shield the person selling from the penalty of the law. *Lower v. The State*.....181

2. **WAGES.—CONTRACT.**—A, by his will, devised his real estate to his wife for life. After the death of A, his widow continued to live upon the land with her children, the eldest son, B, taking the management of the land, and the whole family receiving their support from the common earnings, and living together as one family. After the death of B, the widow filed her claim against his estate for the rents of the farm, and for services in keeping house for him.

Held, that as the evidence failed to show any contract, express or implied, on the part of B, to rent the farm, or to pay his mother for her services, she was not entitled to recover.

Held, also, that as B was a minor at the death of his father, and continued to live with his mother after he attained his majority, as a member of her family, she was not entitled to recover for his board, or he for his labor, without an agreement to that effect. *Hays v. Seward, Adm'r of Hays*.....352

PARTIES.

See WITNESS, 2.

1. **PLEDGE.**—Suit to compel the transfer of stock on the books of a railroad company. The complaint alleged that one A, who was the owner of 407 shares of the stock of the railroad company, delivered the same, without assignment, to B, as collateral security for the payment of ten thousand dollars; that afterward B, still holding said stock, and his debt being unpaid, transferred his interest in the stock to plaintiff, for value received; that plaintiff afterward gave notice, in a public newspaper, that at a given time, and place, he would sell said stock at public auction, and, in pursuance of said notice, did sell the same, and became himself the purchaser for

\$3610; that he afterward demanded of the railroad company the transfer of the stock on their books, which was refused. B was not joined as a defendant.

Held, that as the proof showed the transfer of the stock by B to the plaintiff to have been by way of pledge, B was a necessary party to a complete determination of the controversy, and the company had a right to demand that he should be made a party. *Ind. & Ill. Central R. R. Co. v. McKernan*..... 62

2. **WITNESSES.**—The exception to the law allowing parties to testify in their own behalf, which excludes such testimony "in all suits where an executor, or administrator, or guardian is a party," &c., (2 G. & H. 168, note,) does not apply to an action against the heirs of a decedent to recover real estate or declare a trust, though one of the defendants is an infant, and answers by guardian *ad litem*. *McDonald et al. v. McDonald*..... 68

3. **PARTNERSHIP.**—A, B and C, having been engaged in a partnership business, A sued B for his share of the profits, which he alleged to be in B's hands. The complaint did not aver a dissolution, and an adjustment of the balances between the partners. *Held*, that C was a necessary party. *Duck v. Abbott*..... 249

4. In a proceeding for partition of real estate, a sale of the land was ordered, and A was appointed a commissioner, who, having given bond, and received part of the purchase money, absconded with the money. B was appointed his successor, and an action was brought on the bond, in the name of the State, on the relation of B, and of C, guardian of D, and others, who were not alleged to be minors, and who were part of the persons whose land had been sold. Demurrer on the ground that B had no legal capacity to act as relator, and that the persons whose land had been sold were the only proper relators.

Held, that B was not a proper relator.

Held, also, that C was not a proper

- relator, even though D and others were minors.
Held, also, that the suit should have been brought on the relation of the persons whose land had been sold.
Held, also, that the demurrer was sufficient to present the objection, under the code, that there was "a defect of parties plaintiff." *Mazon v. The State ex rel Simpson* 370
 5. ASSIGNEE OF PROMISSORY NOTE. The assignee of a part interest in a promissory note may join with the owner of the other interest in an action on the note. *Groves v. Ruby et al.*.....418
 6. PRACTICE.—DEFECT OF PARTIES. If a defect of parties be not objected to by demurrer or answer, the objection is waived.....*Ibid*.

PARTITION OF LAND.

See PARTIES, 4.

PARTNERSHIP.

1. ACCOUNT.—Before the adoption of our present code, one partner could not sue another at law, to recover money claimed to be due on the unsettled partnership accounts, but since the distinction between law and equity has been abolished, this rule can have no application. *Duck v. Abbott*.....349
 2. PRACTICE.—PARTIES.—A, B and C, having been engaged in a partnership business, A sued B for his share of the profits, which he alleged to be in B's hands. The complaint did not aver a dissolution, and an adjustment of the balances between the partners. *Held*, that C was a necessary party.....*Ibid*.

PLEADING.

See FORMER RECOVERY. DEMURRER. PRACTICE, 11, 25, 51.

1. LOST INSTRUMENT.—The statute requiring a copy of the written instrument upon which a pleading is based to be filed with it, (2 G. & H., sec. 78, p. 104,) cannot apply to the case of a lost instrument, where no copy can be obtained. *Blasingame et al. v. Blasingame*.....86

2. *Semble*.—That the averment of the loss of a written instrument sued upon, need not be supported by affidavit.....*Ibid*.
 3. COPY OF WRITTEN INSTRUMENT. A, who owned a farm in *Kentucky*, agreed in writing with his son, B, to convey all of his real estate to his son, in consideration of his agreement to support and maintain A and his wife during their natural lives. During the life of the father, the son, with the father's consent, traded and assigned the lands in *Kentucky* for lands in *Indiana*, and, by the agreement and direction of the son, the conveyance was taken in the name of the father, for the purpose of securing the performance of the agreement between them. Suit by the son, alleging these facts; that he had fully performed the agreement on his part, and that the father had died, and by his will devised a portion of the lands to others, who were made defendants.
Held, that the complaint must be understood to mean that the land in *Kentucky*, to which the contract between the parties related, had been conveyed to the son, and that the land in *Indiana*, procured in exchange for the *Kentucky* lands, was paid for by the son, and the deed made to the father only as a security for the performance of his agreement, and in this view of the case, the action was not founded upon the written agreement, and it was not necessary to file a copy of it with the complaint.....*Ibid*.
 4. DEFECTS IN.—The Supreme Court will disregard all defects in the pleadings which do not affect the substantial rights of the adverse party. *The Cin. and Chi. Air Line R. R. Co. v. Rodgers*.....103
 5. COPY OF WRITTEN INSTRUMENT. In an action to set aside a conveyance of real estate, as fraudulent, and subject the land to the payment of a judgment, the fraud, and not the judgment, is the foundation of the action, and a copy of the record of the judgment need not be filed with the complaint. *Bray v. Hussey*.....228
 6. VARIANCE.—PROMISSORY NOTE.—

- In a complaint upon a promissory note, the note was described as payable to the plaintiff, while the note given in evidence was payable to "A, or bearer."
- Held*, that as the variance could have been cured by amendment in the court below, the Supreme Court will, on appeal, regard the amendment as having been made. *McKinlay et al. v. Shank*..... 258
7. REAL PARTY IN INTEREST.—An answer alleging generally that some other person than the plaintiff is the real party in interest, without stating the facts which support that conclusion, is bad. *Raymond et al. v. Pritchard*..... 318
8. SUPPLEMENTAL COMPLAINT.—The office of the supplemental complaint is to bring upon the record such new facts as have occurred since the filing of the original complaint, in order that the court may grant the proper relief upon the facts existing at the time of the final decree. But if the original complaint is wholly defective, and without equity, so that no valid decree could be rendered upon it, the plaintiff cannot sustain his action by filing a supplemental complaint, though the latter may make a case which would entitle him to relief. The cause of action must have existed before the commencement of the suit. *Patten v. Stewart*..... 332
9. COUNTY TREASURER.—Suit against A and his sureties, on a bond given by A as county treasurer. The complaint alleged that A, as such treasurer, had received the sum of \$2,000, which he had failed, on request, to pay over to his successor in office.
- Held*, that the complaint was bad, for failing to show that the money sued for remained in the hands of A at the expiration of his term of office, and had not been paid out by him, on warrants properly drawn upon him, during his continuance in office. *Pickett v. The State ex rel. Board of Commissioners, &c.*..... 366
10. DEFECTS CURED BY VERDICT.—A mortgagee having filed a complaint against the mortgagor for foreclosure, and having purchased the mortgaged premises under the judgment, afterward filed his complaint against A and B, alleging the legal title to be in A, who had executed a title bond therefor to B, who had executed a title bond therefor to the mortgagor; that the purchase money had been paid to A, and that the plaintiff "was entitled to a conveyance in fee simple." The complaint also alleged that the plaintiff, when he received the mortgage, believed that the mortgagor had a good title, &c.
- Held*, that the plaintiff ought to have filed a copy of each of said title bonds with his complaint, but that the omission was cured by verdict, and that a motion in arrest of judgment would not lie.
- Held*, also, that the averment that the plaintiff was entitled to a conveyance of the land in fee simple, though defective, as alleging rather a conclusion of law than facts, was sufficient, after verdict, to support evidence from which such conclusions might have been drawn. *Westfall v. Stark*..... 377
11. SUIT ON RECOGNIZANCE.—A complaint upon a forfeited recognizance alleged that A, the principal obligor, was under arrest, and in the custody of the sheriff, by virtue of a warrant directed to him by the clerk of the *Howard* Circuit Court, issued by the said clerk upon an information previously filed by the district attorney, charging that, in the county &c., A unlawfully sold intoxicating liquor, and that the defendant entered into the recognizance, which was approved by the sheriff.
- Held*, that the complaint was good. *The State v. Hiney et al.*..... 381
12. SAME.—The complaint also alleged that the recognizance was defective in this, "that the subscribing was 'Joseph K. Hiney, Smith & St. Clair,' and it should be *John St. Clair* and *Andrew J. Smith*, for that the said sureties did intend to bind themselves jointly and severally in the aforementioned sum." The copy of the recognizance filed show-

- ed that the instrument filed was signed "*Smith & St. Clair*." *Held*, that the averment, though informal, was sufficient.....*Ibid.*
13. INJURY TO THE PERSON.—NEG-
LIGENCE.—In an action for an in-
jury to the person, caused by the
negligence of another, it must ap-
pear from the complaint, either by
express averment, or by a particu-
lar showing of the facts, that the
injury complained of occurred with-
out the fault or negligence of the
plaintiff. *Ev. & Crow. R. R. Co. v.*
Dexter.....411
14. COPY OF WRITTEN INSTRUMENT.
Where a pleading is founded upon
a written instrument, a copy of the
instrument must be filed with the
pleading, but if such instrument is
only referred to in the pleading, a
copy need not be filed. *Sewright*
et al. v. Coffman.....414
15. SAME.—The omission to file a copy
of the written instrument upon
which a pleading is founded may
be taken advantage of by demur-
rer.....*Ibid.*
16. SUIT ON INJUNCTION BOND.—In
an action upon an injunction bond,
it is not necessary that a copy of
the proceedings and judgment in
the injunction case should be filed
with the complaint. *Winship v.*
Clendenning.....489

PLEDGE.

Where the stocks and bonds of a cor-
poration are pledged, they may,
upon default, be sold for the debt;
but such sale must be at public auc-
tion, and can only be made upon
demand of payment, and notice to
the pledgor of the time and place of
sale. But if the pledgor cannot be
found so as to have a personal de-
mand made upon him, then the
pledgee must resort to his bill, and
have a judicial sale. *The Ind. &*
Ill. Central R. R. Co. et al. v. McKers-
san.....62

POUNDAGE.

Sheriff's. See EXECUTION, 2.

POWER.

A power coupled with an interest is
not revoked by the death of the per-
son granting it. *Wood v. Wallace*
et al......226

PRACTICE.

For criminal practice, See CRIMINAL
LAW.

1. NEW TRIAL.—CUMULATIVE EVI-
DENCE.—Under our statute, a party
to an action may testify in his own
behalf, but he is not bound to resort
to his own evidence, and may have
a continuance for an absent disin-
terested witness to material facts,
known to himself; but if he be-
comes a witness for himself, he
stands as all other witnesses, except
as to his credibility, and is not en-
titled to a new trial for newly dis-
covered cumulative evidence of
facts testified to by him on the trial.
Fox v. Reynolds.....46
2. DEMURRER TO PART OF PARA-
GRAPH.—Under our present prac-
tice, a demurrer will not lie to a
part of a paragraph of a pleading,
but, regarding each separate breach
assigned in a complaint on an ad-
ministrator's bond, taken in con-
nection with the introductory aver-
ments, as a separate paragraph,
containing a distinct cause of ac-
tion, a demurrer may be properly
filed to each breach. *Reno v. Tyson,*
Adm'r of Oldham.....56.
3. PLEDGE OF STOCK.—SALE BY
PLEDGE.—PARTIES.—Suit to com-
pel the transfer of stock on the
books of the company. The com-
plaint alleged that one A, who was
the owner of 407 shares of the
stock of the railroad company, de-
livered the same without assign-
ment to B, as collateral security for
the payment of ten thousand dol-
lars; that afterward B, still hold-
ing said stock, and his debt being
unpaid, transferred his interest in
the stock to plaintiff, for value re-
ceived; that plaintiff afterward
gave notice, in a public newspaper,
that at a given time, and place, he
would sell said stock at public auc-
tion, and, in pursuance of said no-

tice, did sell the same, and became himself the purchaser for \$610; that he afterward demanded of the railroad company the transfer of the stock on their books, which was refused. B was not joined as a defendant. A suffered a default on constructive notice, by publication. The company answered: 1st. That the board of directors had made a by-law that the stock of the company should only be transferred in person or by attorney on the books of the company, which was also expressed in the certificates, and that neither A nor his attorney had applied for such transfer. 2d. That neither A nor B had ever had notice to redeem, or personal notice of the alleged sale.

Held, that as A was only constructively summoned, the allegations of the complaint against him could not be taken as confessed without proof, and the railroad company had a right to insist that the plaintiff should at least show a *prima facie* case of ownership.

Held, also, that as the proof showed the transfer of the stock by B to the plaintiff to have been by way of pledge, B was a necessary party to a complete determination of the controversy, and the company had a right to demand that he should be made a party. *Ind. & Ill. Cent. R. R. Co. v. McKernan*.....62

4. SUPREME COURT.—On the 3d of March, 1860, A filed a transcript of a record in the Supreme Court, and procured a *supersedeas*; about a year afterward the court affirmed the judgment with damages. Some two years later, the judgment remaining uncollected, a transcript of the same record was again filed, and another *supersedeas* obtained. Plea to the assignment of errors, the former judgment of this court.

Held, that the proper judgment is a dismissal of the appeal, at the appellants' costs, but that damages, as on the affirmance of a cause, cannot be awarded. *Maitel et al. v. The German Sav. Fund Soc.* 79

5. SUPREME COURT.—On the trial an objection was made to the introduction in evidence of a deed executed to the plaintiff pending the

suit, but no particular objection was pointed out.

Held, that under such circumstances no advantage can be taken in the Supreme Court of the action of the court below in admitting the deed in evidence. *Moore et al. v. Worley et al.*..... 81

6. SAME.—Where the complaint consists of two paragraphs, the Supreme Court will not notice an alleged error in overruling a demurrer to one, if the finding and judgment of the court proceeded wholly upon the other. *Blasingame et al. v. Blasingame*..... 86

7. AMENDMENTS.—It is error, after the evidence and argument are closed, to allow a party to amend his pleading so as to change the whole character of the case.....*Ibid.*

8. OBJECTION TO EVIDENCE.—Alleged errors growing out of the admission of evidence will not be considered by the Supreme Court, unless the ground of the objection was pointed out to the lower court.....*Ibid.*

9. SUPREME COURT—CONFLICT IN EVIDENCE.—Where there is a clear conflict in the evidence, the Supreme court will not disturb the finding below. *Trisler v. Cornelius*..... 97

10. RECORD.—The Supreme Court will not go outside of the record, to hear oral evidence of the proceedings of the court below. *Lewis v. Prenatt et al.*.....98

11. SUPREME COURT.—The Supreme Court will disregard all defects in the pleadings which do not affect the substantial rights of the adverse party. *The Cincinnati & Chicago Air Line R. R. Co. v. Rodgers*..... 108

12. REFEREE—*Quere*.—Whether an entry of record is a sufficient "written consent" to a trial by a referee, under sec. 369, 2 G. & H. 210. *Goodwine v. Hedrick*..... 121

13. SUBMISSION TO REFEREE.—If the regularity of the submission to the referee was not questioned in the court below, the Supreme Court will presume the submission to have been made "upon the written consent of the parties.".....*Ibid.*

14. SPECIAL FINDINGS.—GENERAL

- VERDICT.**—The special findings of the jury override the general verdict only when both cannot stand; and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues, before the court can be called upon to give judgment against the party who has the general verdict in his favor. *Amidon et al v. Gaff et al.* 128
15. **VERDICT.**—The verdict of a jury, when returned into court, and filed by the clerk, becomes a paper pertaining to the cause, and a part of the record, without being copied into the order book. *Sanders v. Sanders.* 133
16. **LOST VERDICT.**—A lost verdict, like any other paper forming a part of the record, may be supplied by a proved copy. *Ibid.*
17. **DISMISSAL AFTER RETIREMENT OF JURY.**—The plaintiff has no right to dismiss his case, to the prejudice of the defendant, at any time after the jury retire to consider of their verdict. *Ibid.*
18. **BILL OF EXCEPTIONS.**—The legal presumption is that the judge signed the bill of exceptions when presented, and that it was filed by the clerk when signed. *Stewart v. The State.* 142
19. **AMICUS CURIA.**—On the filing of the report of the viewers before the commissioners, in a proceeding for the location of a highway, A appeared as a friend of the court, and asked to file the dismissal of one of the petitioners, and to show by affidavit that another of the petitioners was not a resident of the county. *Held*, that as A was not a party to the record he had no right to be heard in the case at that time. *Little v. Thompson.* 146
20. **INSTRUCTIONS.—EXCEPTIONS TO.** Exceptions to instructions given, or refused, by the court, may be taken either by the attorney writing at the close of each, "given (or refused) and excepted to," and signing it, or by a general bill of exceptions; and when neither of these methods is resorted to, the instructions make no part of the record, and will not be noticed. *Newby v. Warren.* 161
21. **SAME.**—When the words "given (or refused) and excepted to" are written after the instruction, and signed by the judge, instead of the attorney, the exception is not properly reserved. *Ibid.*
22. **DEMURRER.—NEW TRIAL.**—Any matter for which a new trial may be granted, as specified in sec. 352 of the code, must, in order to be available as error in the Supreme Court, have been made the foundation of a motion for a new trial in the court below. But rulings upon demurrers to pleadings are not within the rule. *Gray v. Steer et al.* 174
23. **INSTRUCTIONS.**—Instructions based upon a hypothetical case, where there is no evidence tending to make the case supposed, are out of place, and ought not to be given, as they are only calculated to mislead the jury. *Swank v. Nichols' Adm'r.* 199
24. **JUDGE PRO TEMPORE.**—Where a person other than the regular judge has tried a cause below, and no objection was made on the trial to his authority, and the record is silent on the subject, such objection cannot be raised for the first time in the Supreme Court. *Mitchell v. Smith.* 252
25. **AMENDMENTS.**—The plaintiff has a right, at any time before his complaint is answered, to amend his pleadings, and to file additional paragraphs. *Farrington v. Hawkins.* 253
26. **SAME.**—Where an additional paragraph, filed to a complaint, counts upon a cause of action which accrued subsequent to the service of the summons, it may be stricken out on motion, or, if the defendant appears thereto, he is entitled, on application, to a continuance of the cause. The filing of a demurrer to the paragraph would be a waiver of this right. *Ibid.*
27. **AFFIDAVIT FOR CONTINUANCE.** An affidavit for the continuance of a cause on account of the absence of a witness whose place of residence is alleged to be unknown, must show that diligence has been used to ascertain the whereabouts

- of the absent witness. *McKinley et al. v. Shank*..... 268
28. **INJUNCTION.**—Where a restraining order has been granted upon a complaint duly verified by affidavit, and an amended complaint is afterward filed, the objection that the latter is not supported by affidavit cannot be raised by demurrer. *Hall et al. v. Hough*.....278
29. **WARRANT OF ATTORNEY.**—In entering judgment upon a warrant of attorney, if the warrant contains a statement of the cause of action, a complaint is not necessary. *Agard v. Hawks et al.*..... 276
30. **REHEARING.**—It is too late to present a question for the first time in the Supreme Court, on a petition for rehearing. *Yater et al. v. Mullen*..... 277
31. **WITNESSES—PARTIES.**—Now that parties are permitted to testify in their own behalf, they must be held to the same prompt attendance to give their testimony that the law requires of other witnesses....*Ibid.*
32. **RECOGNIZANCE—SUITS ON.**—In an action upon a forfeited recognizance, given for the appearance of the accused to answer a criminal charge, no *relator* should be named in the complaint, but the action should be prosecuted in the name of the State of Indiana. *Hawkins v. The State ex rel Read*.....288
33. **SAME.**—Where such an action is brought on the relation of the Auditor of the county, the Auditor's name may be stricken out, on motion, as surplusage.....*Ibid.*
34. **APPLICATION TO SET ASIDE JUDGMENT.**—Three days after the rendition of a judgment against him, the defendant appeared and moved to set aside the default and judgment, and filed affidavits in support of his motion. The affidavits disclosed that he had employed counsel to defend for him, and had caused a subpoena to issue for his witnesses; that he had been prevented from attending court himself by the dangerous illness of his wife, and that his attorney, being Provost Marshal of the district, had been so engaged in enforcing the draft, that he had been unable to attend the court, and had neglected to speak to any other attorney to represent him in the case. The affidavits also disclosed a meritorious defense to the action. The court overruled the motion to set aside the judgment.
- Held*, that the motion to set aside the judgment should have been granted.
- Held*, also, that as the plaintiff appeared by attorney, no notice of the application to set aside the judgment was necessary.
- Held*, also, that counter affidavits, controverting the truth of the facts stated in the affidavits upon which the application was based, could not be received.
- Held*, also, that while such applications are, under the statute, addressed to the discretion of the lower court, an appeal will lie from an abuse of that discretion, and the Supreme Court will, in such case, review the action of the lower court. *Hill et al. v. Crump*.....291
35. **REVERSING PREVIOUS RULINGS.** Great caution should be exercised by the Supreme Court in reversing former decisions, which have been received and acted upon as settling the law, and especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful. *Grubbs v. The State*.....295
36. **SAME.**—It is often better in such cases, that what is settled should not be disturbed by judicial action, though it may be wrong.....*Ibid.*
37. **SUPREME COURT.**—Where in a suit there are two conflicting theories, and there was evidence on the trial tending to support each, the Supreme Court will, on appeal, adopt the theory which will sustain the finding of the court below. *Hunter et al. v. Bales*.....299
38. **TRIAL BY THE COURT.**—Where the trial below is by the court, the same presumption will be indulged in favor of the finding, on appeal, as if the trial had been by a jury. *Rowan v. Teague*..... 304
39. **MISJOINDER.**—A misjoinder of causes of action cannot be assigned for error in the Supreme Court. *Rutherford v. Moore*..... 311
40. **CORRECTION OF A RECORD.**—An

- application for the correction of a record must be made to the court in which the proceedings were had. If an imperfect or incorrect transcript has been sent up to the Supreme Court, a writ of *certiorari* will be awarded, upon proper application; but the appellate court must act upon what has been done, and appears of record, below, and cannot undertake to correct the record of the lower court. *Thom et al. v. Wilson's Ex'r*..... 323
41. VERDICT.—A verdict rendered in plain and defiant opposition to all the evidence ought instantly to be set aside. *Crossley et al. v. O'Brien et al.*..... 325
42. MULTIPLICITY OF SUITS.—Suit to enjoin the prosecution of an action to recover the possession of real estate, on the ground that the sheriff's sale, under which the plaintiff claimed, was illegal and void.
- Held*, that as the alleged illegality of the sheriff's sale could have been set up as a defense to the action for the possession of the land, a separate action would only be a useless multiplicity of suits, which ought not to be allowed. *Patten v. Stewart*..... 332
43. BILL OF EXCEPTIONS.—Where time has been given by the court to file a bill of exceptions, if the bill is not tendered, or further time given, within the time first limited, the record is beyond the reach of the court, unless the opposite party be brought in by notice. *Noble v. Thompson* 343
44. SAME.—*Quere*: Whether leave can be given, even after notice to the opposite party, to file a bill of exceptions after the time first fixed for filing it has expired..... *Ibid.*
45. NEW TRIAL.—An application for a new trial, made after judgment, and at a subsequent term of the court, must be regarded as an independent proceeding, and if the application is made on the ground of newly discovered evidence, the evidence given at the trial, together with the newly discovered evidence, must be set out. *Huntington et al. v. Drake*..... 347
46. PARTNERSHIP—ACCOUNT.—Before the adoption of our present code, one partner could not sue another at law, to recover money claimed to be due on the unsettled partnership accounts, but since the distinction between law and equity has been abolished, this rule can have no application. *Duck v. Abbott*..... 349
47. SAME—PARTIES.—A, B and C, having been engaged in a partnership business, A sued B for his share of the profits, which he alleged to be in B's hands. The complaint did not aver a dissolution, and an adjustment of the balances between the partners. *Held*, that C was a necessary party..... *Ibid.*
48. REVIEW—VENUE.—Complaint by the defendant to review a judgment rendered against him by default in the *Fountain* Circuit Court. After the complaint was answered, the court set aside the default and judgment, on motion, and allowed an answer to be filed in the original cause. After this last answer was filed, the venue of the action for review was changed to the *Tipppecanoe* Circuit Court, and, in the latter court, a motion was made and sustained to strike out the answer filed in the original cause, and to vacate the order setting aside the default and judgment. Leave was then granted to amend the complaint for review, and upon the amended complaint, an order was entered setting aside the original judgment. A demurrer was then sustained to the original complaint, and final judgment rendered for the defendant.
- Held*, that the *Tipppecanoe* Circuit Court had authority to act upon the motion to vacate the order of the *Fountain* Circuit Court, setting aside the judgment.
- Held*, also, that the order of the *Fountain* Circuit Court, setting aside the judgment, was erroneous, first, because at the time the order was made, on mere motion, there was an issue of fact pending upon the complaint for review; and, secondly, because the complaint for review, if regarded as a motion for relief, under section 99 of the code, came too late, more than one year

having elapsed since the rendition of the judgment.

Held, also, that though the original complaint for review did not make a case which would have authorized a review of the judgment, but, at most, only disclosed facts which would have entitled the party to relief, on motion, within one year, still, as it purported on its face to be a complaint for review, and was so treated by the parties, by changing the venue, it must be held to have been a proceeding under the statute for the review of a judgment, and, hence, leave was properly granted to amend the complaint. *Foster, Adm'r of Nave v. Potter*..... 363

49. PARTITION—PARTIES.—In a proceeding for partition of real estate, a sale of the land was ordered, and A was appointed a commissioner, who, having given bond, and received part of the purchase money, absconded with the money. B was appointed his successor, and an action was brought on the bond, in the name of the State, on the relation of B, and of C, guardian of D, and others, who were not alleged to be minors, and who were part of the persons whose land had been sold. Demurrer on the ground that B had no legal capacity to act as relator, and that the persons whose land had been sold were the only proper relators.

Held, that B was not a proper relator.

Held, also, that C was not a proper relator, even though D and others were minors.

Held, also, that there being no averment that D and others were minors, they must be presumed to have been adults.

Held, also, that the suit should have been brought on the relation of the persons whose land had been sold.

Held, also, that the demurrer was sufficient to present the objection, under our code, that there was "a defect of parties plaintiff." *Maxedon v. The State, ex rel Simpson*.....370

50. GENERAL ISSUE—PROOF UNDER, IN REAL ACTION.—A complaint for the possession of real estate alleged

that the plaintiff was the owner and entitled to the possession of the land, and was kept out of possession thereof by the defendant. Answer, a general denial.

Held, that under the issue, the plaintiff might prove that he executed a conveyance of the land during infancy, and disaffirmed it on attaining to full age. *Miles v. Lingermon*.....385

51. DEFECT OF PARTIES.—If a defect of parties be not objected to by demurrer or answer, the objection is waived. *Groves v. Ruby et al*...418

52. INTEREST AFTER VERDICT.—Six months having intervened between the finding of the verdict and judgment, the court, in rendering judgment, allowed interest from the date of the verdict.

Held, that the objection to the allowance of interest on the verdict could not be raised by a motion for a new trial, or in arrest of judgment. *Ibid*.

53. CREDIBILITY OF WITNESSES.—It is the exclusive province of the jury to determine the credibility of witnesses, and the Supreme Court will not examine into their action for the purpose of disturbing the verdict. *Hollingsworth v. Pickering et al*...435

54. A question presented for the first time in the Supreme Court will not be considered. *Smith et al. v. Alexander et al*.....454

PRINCIPAL AND SURETY.

See SURETY.

PROMISSORY NOTES.

1. USURY—PROVING FOREIGN STATUTE.—Suit upon promissory notes reserving interest at the rate of ten per cent. Answer, that the notes were made and delivered in the State of New York, and not in the State of Michigan, where they bore date; that by the laws of New York seven per cent. interest only could be taken or reserved, and if a greater rate of interest should be reserved, such note was void. Two sections of the law of New York were set out, the first fixing the legal rate of interest at seven per cent., and the second providing that when a greater rate "than as above

described" was reserved, the contract should be void. On the trial of the cause, the second section only of the law of *New York* was given in evidence, and judgment was given for the principal of the notes, and interest at the rate of six per cent.

Held, that as the section of the law of *New York* given in evidence, did not show what the legal rate of interest in that State was, the judgment of the court was not erroneous. *Keayon et al. v. Smith*....11

2. CONSIDERATION. — PAROL EVIDENCE.—A sued B upon a promissory note given by him to C, and transferred by delivery to A. Answer, that B, desiring to purchase a certain tract of land of D, who was unfriendly to him, procured C to make the purchase in his own name, while B went upon the notes given for the purchase money, ostensibly as the surety of C. In execution of the agreement, C conveyed the land to B, the latter executing his notes, corresponding to the notes already given by C to D, upon which B was surety, it being at the time agreed that C should deliver B's notes to D, and take up those originally given; that C, in violation of the agreement, had assigned the notes of B to the plaintiff for his own debt, while B had been compelled to pay the notes to D, upon which he was surety.

Held, that as the note sued on was not payable in a bank in this state, it was subject to whatever defense, or set-off, the maker had, before notice of assignment, against the payee.

Held, also, that the agreement set up in the answer did not vary the terms of the written contract, but went to the consideration of the note, and to show the relation of the joint makers to D, the payee, which might be done by parol evidence, even if the legal effect of the writing was changed thereby.

Held, also, that in this class of cases circumstances tending to show knowledge, in the absence of fraud, are not equivalent to notice of assignment. The burden of showing notice is on the plaintiff. *Rawlings v. Fisher*.....52

3. VERBAL CONDITION.—A verbal condition cannot be annexed to a promissory note, or other written contract. A verbal contract may constitute the consideration of a written contract, but a note for a given amount cannot be trammelled with a verbal condition, which shall make it obligatory for a less sum. *Swank v. Nichols' Adm'r*.....199

4. ASSIGNMENT OF PART INTEREST. A part interest in a promissory note may be assigned in equity, and the assignee, being the real party in interest, can, under our statute, join with the owner of the other interest in an action upon the note. *Groves v. Ruby et al* 418

5. CONDITIONAL DELIVERY BY SURETY.—A executed his promissory note, payable to the order of B, and induced C and D to sign the note as sureties, and re-deliver to him, A, upon the promise that he would procure other persons, named by them, also to execute said note. In disregard of his promise, A delivered the note to B, without procuring the additional sureties agreed upon.

Held, that the delivery to B was absolute, and that the sureties were liable, without regard to the condition. *Deardorff et al. v. Foreman*..... 481

R.

RAILROADS.

1. INJURY TO STOCK.—Under the law of 1863, "to provide compensation to owners of animals killed," &c., (Acts 1863, p. 25,) all animals killed at any one time constitute a separate and indivisible cause of action, and two of these causes cannot be united to give jurisdiction to the Circuit Court. *The Ind. & Cin. R. R. Co. v. Kercheval*.....139

2. SAME.—Complaint in the Circuit Court, in two paragraphs, for stock killed at different times. The first paragraph was for a horse worth \$200, and the second for a cow worth \$50.

Held, that as to the second paragraph of the complaint the Circuit Court

had no jurisdiction, as the value of the cow did not exceed \$50.....*Ibid.*

8. **SAME.—FENCES.**—Suit against the railroad company for killing stock. The complaint alleged that the fence along the road took fire, and the servants of the company, to extinguish the fire, threw down a gap in the fence, which was negligently left open, &c.

Held, that the circumstances alleged were equivalent to an averment that the railroad fence was not properly maintained.

Held, also, that if the road was securely fenced, and the fence was accidentally destroyed by fire, and was rebuilt within a reasonable time afterward, the company was not liable for the injury.

Held, also, that the court correctly refused to instruct the jury, "that the fact that hands of the company working in a gravel pit had notice of the defect in the fence, would not bind the company, but that such notice must have come to some person or agent connected with keeping up the fence, or to some agent of the company." *I. P. & C. R. R. Co. v. Twitt*.....162

4. **SAME.—HIGHWAYS.**—Railroad companies are required by statute to fence their roads, and, construing this law as a police regulation, for the safety of the public, the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law. *Ind. & Cin. R. R. Co. v. Guard*.....222

5. **SAME.—STREET CROSSINGS.**—Where an animal passes upon a railroad track at the crossing of a public street or highway, or other place, where, from any cause, it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the train. *Ind. & Cin. R. R. Co. v. McKinney*.....288

6. **SAME.**—The fact that a public highway runs along the side of a railroad track does not, of itself, show a valid reason why a fence could not be maintained between

the highway and the track, but rather shows the stronger reason why the railroad should be fenced.*Ibid.*

7. **SAME.**—The owner of an animal killed or injured by the cars of a railroad company may recover therefor, if the road is not fenced, though he be not an adjoining proprietor, and has been guilty of negligence in permitting the animal to stray upon the railroad.....*Ibid.*

8. **HIGHWAYS.**—Even if the ground used for a railway, owned by a private corporation, might be appropriated, in whole, or in part, for a common highway, under the right of eminent domain, yet it cannot be thus appropriated without being paid for. *Crossley et al v. O'Brien et al*.....325

9. **INJURY TO ANIMALS.**—The owner of a blind horse turned him out upon the common of a town, through which a railroad ran, where he was killed by a passing train. The injury did not occur on any street or alley, and the track was not fenced.

Held, that the owner was guilty of gross negligence, amounting to a willingness to suffer the injury complained of, and hence he cannot recover. *Knight, Adm'r of McKachan v. Toledo & Wabash R. R. Co*.....402

10. **BONDS.**—The *Martinsville & Franklin Railroad Company* issued certain bonds, payable to the order of the *Madison & Indianapolis Railroad Company*, for the purpose of borrowing money to complete the road of the former company. The bonds were delivered to the *Madison Company*, and were indorsed and guaranteed by that company, and sent to its agent at *New York* for sale. The agent, in a circular offering the bonds for sale, represented that they were owned by the *Madison Company*. Sued by the holders of the bonds against the *Madison & Indianapolis Railroad Company* upon its guaranty.

Held, that it is within the corporate powers of the *Madison & Indianapolis Railroad Company* to sell and guarantee bonds held by it in the usual course of its business.

Held, also, that as the contract of

guaranty upon the bonds was, upon its face, such a contract as the company had power to make, the fact that the guaranty was, in this case, made for a purpose not authorized by the charter, (as for the accommodation of another road,) could not affect the right of a *bona fide* holder, without notice, to recover upon it.

Held, also, that the general agent of a corporation, clothed with certain powers by the charter, or the lawful act of the corporation, may use those powers for an unauthorized, or even a prohibited, purpose, in his dealings with an innocent third party, and yet the corporation be held liable for his acts. *Madison & Ind. R. R. Co. v. The Norwich Saving Society*.....457

RECOGNIZANCE.

1. **SUITS ON.**—In an action upon a forfeited recognizance, given for the appearance of the accused to answer a criminal charge, no *relator* should be named in the complaint, but the action should be prosecuted in the name of the State of Indiana. *Hawkins v. The State ex rel Read*..288
2. **SAME.**—Where such an action is brought on the relation of the Auditor of the county, the Auditor's name may be stricken out, on motion, as surplusage.....*Ibid*.
3. **SAME—JURISDICTION.**—The Court of Common Pleas has jurisdiction of an action brought upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the defendant to answer a charge of felony in the Circuit Court.*Ibid*.
4. **SAME.**—In a suit upon a forfeited recognizance, taken by a justice of the peace, for the appearance of the accused to answer a charge of felony in the Circuit Court, the facts showing the authority of the justice to take the recognizance must be shown.....*Ibid*.
5. **SAME.**—A complaint upon a forfeited recognizance alleged that A, the principal obligor, was under arrest, and in the custody of the sheriff, by virtue of a warrant directed to him

by the clerk of the *Howard* Circuit Court, issued by the said clerk upon an information previously filed by the district attorney, charging that, in the county &c., A unlawfully sold intoxicating liquor, and that the defendant entered into the recognizance, which was approved by the sheriff.

Held, that the complaint was good. *The State v. Hiney et al*.....881

6. **SAME.**—The complaint also alleged that the recognizance was defective in this, "that the subscribing was 'Joseph K. Hiney, Smith & St. Clair,' and it should be John St. Clair and Andrew J. Smith, for that the said sureties did intend to bind themselves jointly and severally in the aforementioned sum." The copy of the recognizance filed showed that the instrument was signed "Smith & St. Clair."

Held, that the averment, though informal, was sufficient.....*Ibid*.

RECORD.

Of Deed, see DEED.

1. **RECORD OF MORTGAGE.—ENTRY BOOK.**—Where a mortgage is left for record with the recorder, and is entered by him in the entry book, as required by the statute, it must be deemed to be recorded from the date of its reception, as noted on the entry book, and no injury can result to any one from a failure of the recorder actually to record the instrument. *Kessler v. The State ex rel Wilson*.....818 ✓
2. **EVIDENCE.**—A properly certified copy of an affidavit which had been filed in the Supreme Court, as the basis of a motion to reinstate a case which had been dismissed, was given in evidence against the party who had made it, in an action in the lower court. *Held*, that as it did not appear that any motion was made upon the affidavit to reinstate the case, and as the case dismissed was no longer *in fieri*, the affidavit was not the fragment of a record, but an isolated paper. *Thom et al. v. Wilson's Ex'r*.....828
3. **TITLE BOND.**—Section 85 of the

"Act concerning real estate and the alienation thereof," 1 G. & H. 266, authorizes the recording of executory contracts for the sale of lands, and the record of such instrument is constructive notice of its contents to all subsequent purchasers or mortgagees. *Case v. Bumstead*.....429

REDEMPTION.

Effect of sheriff's representation that land would be sold subject to. See SHERIFF'S SALE, 4.

REFEREE.

See JURY, 2.

1. *Quere.*—Whether an entry of record is a sufficient "written consent" to a trial by a referee, under sec. 349, 2 G. & H. 210. *Goodwins v. Hedrick*.....121
2. PRACTICE—SUBMISSION TO REFEREE.—If the regularity of the submission to the referee was not questioned in the court below, the Supreme Court will presume the submission to have been made "upon the written consent of the parties.".....*Ibid.*

REHEARING.

PRACTICE.—It is too late to present a question for the first time, in the Supreme Court, on a petition for a rehearing. *Yater et al. v. Mul-len*.....277

REMEDY.

See CONSTITUTIONAL LAW, 8.

RENTS.

1. COVENANT FOR RENT.—A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. *Carley v. Lewis et al.*.....28
2. SAME.—The land itself is the principal debtor, and the covenant to

pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee, and the lessor has his election either to sue the lessee or his covenant or to follow the land in the hands of his assignee. This rule is not changed by the statute of this state regulating the relation of landlord and tenant, (2 G. & H., sec. 17, p. 360).....*Ibid.*

3. ADMINISTRATOR.—Ordinarily, an administrator is not chargeable with the rents of real estate accrued during his administration. *Belton v. Morrow's Adm'r*.....37

REPLEVIN.

1. SUIT ON BOND.—Where the right of property has been tried in an action of replevin, it becomes an *adjudicata*, and cannot, nor can any other issue tried and determined in such suit, be again put in issue in an action on the replevin bond. *Denny v. Reynolds et al.*.....36
2. GENERAL FINDING.—A general finding for the plaintiff, in an action of replevin, involves a finding that the plaintiff is the owner of the property, where such ownership is alleged in the complaint. *Boss v. Teague*.....204

RES ADJUDICATA.

See JUDGMENT, 1, 2, 3.

RESCISSION.

See CONTRACT, 4, 11, 12, 13. VENDS AND PURCHASER, 14, 15, 16.

RESIDENCE.

1. COUNTY BOARD.—A member of a county board need not continue to reside in the district for which he was elected. *Smith v. Smith*.....161
2. DIVORCE.—The residence of the plaintiff determines the jurisdiction in suits for divorce. *Buoy v. Ewing*.....463

REVENUE LAW.

See STAMPS.

REVIEW.

REVIEW. — PRACTICE. — Complaint by the defendant to review a judgment rendered against him by default in the *Fountain* Circuit Court. After the complaint was answered, the court set aside the default and judgment, on motion, and allowed an answer to be filed in the original cause. After this last answer was filed, the venue of the action for review was changed to the *Tippecanoe* Circuit Court, and, in the latter court, a motion was made and sustained to strike out the answer filed in the original cause, and to vacate the order setting aside the default and judgment. Leave was then granted to amend the complaint for review, and upon the amended complaint, an order was entered setting aside the original judgment. A demurrer was then sustained to the original complaint, and final judgment rendered for the defendant.

Held, that the *Tippecanoe* Circuit Court had authority to act upon the motion to vacate the order of the *Fountain* Circuit Court, setting aside the judgment.

Held, also, that the order of the *Fountain* Circuit Court, setting aside the judgment, was erroneous, first, because at the time the order was made, on mere motion, there was an issue of fact pending upon the complaint for review; and, secondly, because the complaint for review, if regarded as a motion for relief, under section 99 of the code, came too late, more than one year having elapsed since the rendition of the judgment.

Held, also, that though the original complaint for review did not make a case which would have authorized a review of the judgment, but, at most, only disclosed facts which would have entitled the party to relief, on motion, within one year, still, as it purported on its face to be a complaint for review, and was so treated by the parties, by changing the venue, it must be held to have been a proceeding under the statute for the review of a judgment, and, hence, leave was prop-

erly granted to amend the complaint. *Foster, Adm'r of Nave v. Potter*..... 868

S.

SELF DEFENSE.

See CRIMINAL LAW, 8, 10.

SET-OFF.

SATISFACTION OF MUTUAL CLAIMS, NOT IN JUDGMENT.—Suit by A against B and C, upon a promissory note made by B. The complaint alleged that B, being insolvent, had, for the purpose of defrauding his creditors, assigned all of his notes and accounts to C, and among them a note made by A to him. Prayer for judgment against B, and that the assignment to C might be declared fraudulent, and the amount of plaintiff's indebtedness to B be allowed as a set-off on the note sued on. On the trial, it appeared that C was the attorney of B, and that the assignment of the note against A was in trust to collect the same, and apply the proceeds *pro rata* upon the domestic debts of B. None of the creditors had been consulted, and but one of them assented to the arrangement.

Held, that though the note against A, assigned by B to C, must be regarded as belonging in equity to B, yet A was not entitled, before both claims had passed into judgment, to obtain satisfaction of his debt to B, by applying it upon the claims sued upon, without proof of B's insolvency.

Held, also, that the rule in equity is, that such relief will not be granted, where the claims are wholly disconnected, unless there are some special circumstances, such as the insolvency or non-residence of the defendant. *Knightley v. Walls et al.*.....206

SHERIFF'S SALE.

1. **LIMITATIONS. — SUIT TO AVOID SHERIFF'S SALE.**—Sec. 211, 2 G. & H., 158, which enacts that actions for the recovery of real property

- sold on execution, brought by the execution debtor, his heirs, &c., must be begun within ten years after the sale, does not mean that a sheriff's sale shall be beyond question after the lapse of ten years, where the possession of the execution defendant has not been disturbed during that period, nor that after the sheriff's sale has been declared void by judicial determination, it shall yet be protected by the expiration of ten years from its date. *Gray v. Stiver et al.*.....174
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3. **SAME.**—It has been held by this court that the statute applies even where the court has not acquired jurisdiction over the persons of the owners of the land sold. Indeed, the statute would be useless, if it only protected titles which do not need protection.....*Ibid.*
4. **LIEN OF PURCHASER FOR PRICE PAID.**—Suit by the execution debtor to set aside a sheriff's sale of real estate. At the time of the sale, the sheriff represented to bidders that the land would be sold subject to redemption by the execution defendant within one year, under the act of 1861, afterward held inoperative, by means of which representation persons were prevented from bidding, and the land was sold for one-third of its value. The court below set aside the sale, but decreed the price paid by the purchaser a lien upon the land, to be enforced by execution.
Held, that the representations made by the sheriff might well be shown to avoid the sale, taken in connection with the inadequacy of price.
Held, also, that the purchaser was entitled to recover the purchase money paid by him at the sheriff's sale, and to have his lien declared without bringing his separate action.
Held, also, that the power possessed by the court to secure to the purchaser the return of his money, by
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SINKING FUND SALES.—TAXES.—Where lands mortgaged to the Sinking Fund are offered for sale for the non-payment of the mortgage debt, and are bid in for the State, and subsequently sold, the purchaser is entitled to take the lands freed from all assessments and taxes made and levied between the date of the mortgage and the date of his deed from the State. But where the lands are not bid in for the State, but are taken by a purchaser at the first offer, they remain subject to such assessments and taxes. *Groom, Auditor, &c., v. The State ex rel. Bowlin.*.....265

SLANDER.

1. **MITTON SENSUS.**—The doctrine that, in actions of slander, the words spoken are to be construed

- in mitiori sensu*, has been exploded, and the rule now is, that such words are to be understood according to their plain and natural import, and according to the ideas they are calculated to convey to those to whom they are addressed. *O'Conner v. O'Conner*.....218
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Of jury, overrides general verdict when.
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SPECIAL LEGISLATION.

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1. AGAINST WIFE.—Suit by A and wife against B, for the partition of lands. The complaint alleged that A was entitled in his own right to the undivided four-elevenths, and his wife to one-eleventh of the lands, and the defendant, B, to the remaining six-elevenths. Answer by B, that the parties had before suit mutually agreed to a partition, and that the plaintiffs, under the name of A, had in pursuance of such agreement executed and delivered to the defendant, B, a bond, by which they bound themselves to convey to him a certain portion of said lands, and that he, B, had

made a like bond to the plaintiffs, by which he agreed to convey to A the other part of said lands; that each took possession of their separate tracts, and that defendant had made improvements; that at the time stipulated, he had made and tendered a deed to A for the land so set apart to him, and demanded of him a deed for the land agreed to be conveyed to him, defendant; that A refused to accept the deed, or to perform the obligations of his bond to defendant. Prayer, that a specific performance be decreed against the plaintiffs. The court decreed a specific performance of the bond against A and wife, though the bond did not purport to be executed by the wife.

Held, that the court below erred in decreeing a specific performance of the bond against the wife of A, as the bond set up in the answer contained no obligation to be performed by her, and such a decree operated to divest her of a portion of her estate, and transfer it to the husband.

Held, also, that the answer setting up a bond not purporting to be executed by the wife, was no bar to the action as to her, and the demurrer to the reply should have been sustained to the answer. *Beaver et ux v. Tritipo*.....41

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Held, that B was entitled to a decree

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6. **TENDER.**—In a suit for specific performance, where money is due from the plaintiff, it is sufficient for him to offer by his complaint to bring it into court, whenever the same shall be liquidated, and he has a decree for performance.....*Ibid.*

7. **HUSBAND AND WIFE—TITLE BOND.**—A sold certain real estate to B for \$300, the price to be paid in labor. At the request of B, A executed to the wife of B a title bond, conditioned for the conveyance of the property to her, on payment of the price. Suit by the wife for a specific performance, alleging that about \$250 of the purchase money had been paid by the labor of the husband, and offering to pay the residue in money, when the amount should be ascertained.

Held, that a husband may give real estate to his wife, whether his title be an absolute fee, or merely a right in equity, and the equitable estate of B having, in this case, passed by an executed gift to the wife, she was entitled to enforce a specific performance of the bond. *Held*, also, that the consideration of a contract need not have moved

from the party in whose favor it was made, and who seeks to enforce it. *Raymond et al. v. Pritchard*..... 318

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Held, that if the want of proper stamps rendered the certificate and bond insufficient, the appellant had a right, under the statute, to have the certificate amended, and to file a sufficient bond.

Held, also, that as the alleged defect in the certificate and bond was cured by attaching the proper stamps, it was error to dismiss the appeal.

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2. **SAME.**—It is often better in such cases, that what is settled should not be disturbed by judicial action, though it may be wrong.....*Ibid.*
3. **PRACTICE.**—Where in a suit there are two conflicting theories, and there was evidence on the trial tending to support each, the Supreme Court will, on appeal, adopt the theory which will sustain the finding of the court below. *Hunter et al. v. Bales*.....299
4. **JURISDICTION.**—In a prosecution instituted before the mayor of a town, for a violation of a town ordinance, a fine of \$5 was assessed against the defendant, and on appeal to the Circuit Court a like fine was again assessed.
Held, that an appeal will not lie to the Supreme Court, the amount in controversy being less than \$10. *Donovan v. The Town of Huntington*.....321
5. **PRACTICE.**—An application for the correction of a record must be made to the court in which the proceedings were had. If an imperfect or incorrect transcript has been sent up to the Supreme Court, a writ of *certiorari* will be awarded, upon proper application; but the appellate court must act upon what has been done, and appears of record, below, and cannot undertake to correct the record of the lower

court. *Thom et al. v. Wilson's Ex'r*.....323

SURETY.

1. **EXECUTOR'S BOND.—LIABILITY OF SURETY.**—The surety on the original bond of an executor is not liable for the misappropriation of money received from the sale of real estate, unless such sale was directed by the will. *Reno v. Tyson, Adm'r of Oldham*.....56
2. **CONDITIONAL DELIVERY BY SURETY.**—If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it shall not be delivered to the obligee, payee or grantee, until some other persons who are agreed upon shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee or grantee has no knowledge of the condition, the delivery will bind the surety. *Deardorf et al. v. Foresman*.....481
3. **SAME.—PROMISSORY NOTE.**—A executed his promissory note, payable to the order of B, and induced C and D to sign the note as sureties, and re-deliver to him, A, upon the promise that he would procure other persons, named by them, also to execute said note. In disregard of his promise, A delivered the note to B, without procuring the additional sureties agreed upon.
Held, that the delivery to B was absolute, and that the sureties were liable, without regard to the condition.....*Ibid.*

T.

TAXES.

See BOARD OF EQUALIZATION.

1. **SINKING FUND SALES.**—Where lands mortgaged to the Sinking Fund are offered for sale for the non-payment of the mortgage debt, and are bid in for the State, and subsequently sold, the purchaser is entitled to take the lands freed from all assessments and taxes

- not in embarrassed or failing circumstances.
22. **COMMON CARRIER.**—An express company may become liable as a common carrier, though it has not complied with the requirements of section 2 of the "Act declaring express companies to be common carriers." (1 G. & H. 827.) *U. S. Express Co. v. Bush et al.*..... 408
23. **TITLE BOND.**—Section 35 of the "Act concerning real estate and the alienation thereof," 1 G. & H. 266, authorizes the recording of executory contracts for the sale of lands, and the recording of such an instrument is constructive notice of its contents to all subsequent purchasers or mortgagees. *Cass v. Burnstead*..... 429
24. **DIVORCE.—NEW TRIALS.**—Section 99 of the code, which provides for relieving a party from a judgment taken against him through his mistake, inadvertence, or excusable neglect, and section 356, which provides for granting a new trial within one year, on cause shown, do not apply to decrees for divorce. *Bwing v. Bwing*..... 468
25. **COUNTY BOARDS.—SPECIAL SESSIONS.**—*Seemle*, that under the statute authorizing the county auditor to call a special session of the board of county commissioners, "whenever the interests of the county demand it," the auditor must determine the necessity of such special session, and his action cannot be reviewed by the courts. *Oliver v. Keightly, Auditor, &c.*..... 514

STOCK.

Pledge of. See **PLEDGE.**

STREETS.

RAILROADS.—FENCES.—Where an animal passes upon a railroad track at the crossing of a public street or highway, or other place where, from any cause, it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the

train. *Ind. & Cm. R. R. Co. v. McKinney*..... 263

SUBSTITUTE.

DRAFT.—SUBSTITUTE.—Suit upon a note and to foreclose a mortgage. Answer, that the defendant having been drafted to serve in the army for nine months, agreed with the plaintiff to pay him \$300 if he would go as his substitute, and serve the *United States* as a soldier for nine months, and executed to him the note sued on for a part of said sum; that the plaintiff, after remaining in camp a few weeks, deserted and fled to parts unknown. *Held*, that a demurrer to the answer was correctly overruled. *Held*, also, that though the defendant was released from the effect of the draft by the acceptance of the plaintiff as his substitute, he was also interested that the plaintiff should serve the country as a soldier, as he had agreed, and was entitled to defend on failure of this part of the consideration. *Nelson v. McPike et al.*..... 60

SUNDAY.

Sales of Liquor on. See **LIQUOR LAW**, 2.

SUPPLEMENTAL COMPLAINT.

1. Where an additional paragraph, filed to a complaint, counts upon a cause of action which accrued subsequent to the service of the summons, it may be stricken out on motion, or, if the defendant appears thereto, he is entitled, on application, to a continuance of the cause. The filing of a demurrer to the paragraph would be a waiver of this right. *Farrington v. Hawkins*..... 253
2. The office of the supplemental complaint is to bring upon the record such new facts as have occurred since the filing of the original complaint, in order that the court may grant the proper relief upon the facts existing at the time of the final decree. But if the original complaint is wholly defective,

and without equity, so that no valid decree could be rendered upon it, the plaintiff cannot sustain his action by filing a supplemental complaint, though the latter may make a case which would entitle him to relief. The cause of action must have existed before the commencement of the suit. *Patten v. Stewart*..... 332

SUPREME COURT.

1. **REVERSING PREVIOUS RULINGS.** Great caution should be exercised by the Supreme Court in reversing former decisions, which have been received and acted upon as settling the law, and especially when a rule of property would be overturned, and that would be made criminal which had before been adjudged lawful. *Grubbs v. The State*....295
2. **SAME.**—It is often better in such cases, that what is settled should not be disturbed by judicial action, though it may be wrong.....*Ibid.*
3. **PRACTICE.**—Where in a suit there are two conflicting theories, and there was evidence on the trial tending to support each, the Supreme Court will, on appeal, adopt the theory which will sustain the finding of the court below. *Hunter et al. v. Bales*.....299
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1. **SINKING FUND SALES.**—Where lands mortgaged to the Sinking Fund are offered for sale for the non-payment of the mortgage debt, and are bid in for the State, and subsequently sold, the purchaser is entitled to take the lands freed from all assessments and taxes

- made or levied between the date of the mortgage and the date of his deed from the State. But where the lands are not bid in for the State, but are taken by a purchaser at the first offer, they remain subject to such assessments and taxes. *Groom, Auditor, &c., v. The State ex rel. Bowlin*.....255
2. CONSTITUTIONAL LAW.—EDUCATION.—The intention of section 1 of article 10 of the constitution of 1851, was to leave the legislature at liberty to encourage the establishment of institutions of learning, by exempting them from the usual burden of taxation, whether the enterprise might be undertaken on public or private account. *City of Indianapolis v. Sturdevant*....391
3. SAME.—This immunity to the founders of such institutions is not in conflict with the twenty-third section of the bill of rights...*Ibid.*
4. TAXATION.—EXEMPTION FROM.—A building was erected upon a lot in *Indianapolis*, for the use of a literary and scientific institution, and the premises were kept and appropriated for that use, a corps of teachers being employed in instructing large numbers of pupils in ancient and modern languages, in the various sciences, and in the branches of education usually taught in colleges. The institution was conducted on private account, and the earnings were applied to the individual benefit of the proprietor.
- Held*, that under the act of 1861, the property was exempt from taxation.*Ibid.*
5. SAME.—By the term "institution," as employed in said act, is meant a permanent establishment, in contradistinction to an enterprise of a temporary character.....*Ibid.*
6. *See Ewing v. Batsner et al.*.....409
7. CITY OF MADISON.—TAXATION. The charter of the City of *Madison* provides that a tax for municipal purposes may be assessed upon all personal property owned by, or in the possession of, any inhabitant of the city, "except goods and produce for export, or in transit." A, being engaged in pork packing in said city, and having all of this

capital invested in pork held for export, and in process of shipment to a foreign market, refused to return the same for taxation, and was thereupon assessed for "capital invested in pork, \$50,000," and taxes charged against him upon that sum.

Held, that the assessment was illegal, because the property, if taxable, should have been assessed as pork, and not as "capital."

Held, also, that the pork, being "produce for export," was not subject to taxation under the city charter. *Fitch et al v. The City of Madison et al.*.....425

TEMPERANCE LAW.

See LIQUOR LAW.

TENDER.

1. OF TOO MUCH.—The tender of an amount of money in discharge of a debt is an admission of the amount due, but is not conclusive, and if too much has been tendered, no obligation is created to pay or keep good the whole amount tendered. *Abel v. Opel et ux*.....250
2. SHERIFF'S SALE.—The power possessed by the court to secure to a purchaser at sheriff's sale the return of his money, by decreeing a lien for the same upon the land, would seem to render a tender of repayment by the execution defendant unnecessary. *Seller v. Lieberman*.....264
3. SPECIFIC PERFORMANCE.—In a suit for specific performance, where money is due from the plaintiff, it is sufficient for him to offer by his complaint to bring it into court, whenever the same shall be liquidated, and he has a decree for performance. *Hunter et al v. Balas*.....299
4. INTEREST AFTER TENDER.—After the obligee in a title bond tenders the purchase money and all interest accrued, and demands a conveyance, he is not chargeable with interest, unless he has used the money, and it is incumbent on the vendor to prove such use.....*Ibid.*

5. **TENDER OF DEED.**—Where a vendee of real estate has received a conveyance, and has entered into possession, he must, if he seeks a rescission of the contract, tender to his vendor a reconveyance, and offer to restore to him the possession, before commencing his action. *Patton v. Stewart*.....382
6. **INFANT. — DISAFFIRMANCE OF DEED BY.**—One who has disaffirmed a conveyance made during infancy is not required to tender back the purchase money to support an action to recover possession of the land. *Miles v. Lingerman*...385

TIME.

COMPUTATION OF TIME.—Where an act is to be done within a given number of days "from the time of the contract," the day upon which the contract was made must be counted as a whole day, in making the computation. *Brown v. Buzan*.....194

TITLE BOND.

Record of, notice of contents. See STATUTES CONSTRUED, 23.

TITLES OF LAWS.

1. **CONSTITUTIONAL CONSTRUCTION.** The words "subject" and "matters," as used in sec. 19, art. 4 of the Constitution, which provides that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," are as nearly synonymous as possible; the one, "subject," being used to indicate the chief thing about which legislation is had, and the other, "matters," things which are secondary, subordinate or incidental. *Hingle v. The State*.....28
2. **SAME.**—The evils intended to be prevented by this section were: 1st, the passage of laws under false and delusive titles, whereby members of the Legislature might be deceived into the support of them; and, 2d, the combining together, in one act, of two or more subjects, having no relation to each other, by which

means members might be constrained to support measures obnoxious to them, in order to procure such legislation as they wished.....*Ibid.*

3. **SAME.**—The insertion in the act to regulate the liquor traffic, of a section conferring upon particular courts jurisdiction of cases prosecuted for its violation, (1 G. & H. sec. 615,) is not in violation of sec. 19, art. 4 of the Constitution, but is matter properly connected with the subject of the act.....*Ibid.*

4. **BOUNTY LAW.**—The title of the act of March 8, 1865, which legalizes the appropriations made by county boards and municipal authorities for bounties to volunteers, while not the most appropriate, is not so defective as to render the law unconstitutional. *Coffman v. Keightley, Auditor, &c.*.....609

TOWN.

TOWN—CITY.—The word *town* is generic, comprehending city, and hence the law which makes shooting in a "town or village" a misdemeanor applies to cities. *Flem v. The State*.....286

TREASURER, COUNTY.

See PLEADING, 9. LIMITATIONS, 5.

TRIAL.

See JURY. PRACTICE.

SEPARATE TRIAL.—In trials for misdemeanors upon information, an application for a separate trial is addressed to the discretion of the judge before whom the cause is heard. *Hibbs et al. v. The State*.....140

TROVER.

See DAMAGES, 2.

TRUSTS.

See VENDOR AND PURCHASER, 18.

1. **RESULTING TRUST.**—When an estate is purchased in the name of

one, with money belonging to and paid by another, a trust results in favor of the party to whom the money belonged, and this trust, thus implied by law, cannot be defeated by the fact that it was orally declared and acknowledged by the parties. *McDonald et al. v. McDonald*..... 68

2. SAME.—The statute of trusts and powers, (1 G. & H. secs. 6, 8, p. 651,) expressly admits a trust where a conveyance of land is made to one, the consideration being paid by another, if by agreement, without any fraudulent intent, the party to whom the conveyance was made was to hold the land in trust..... *Ibid.*

U.

USURY.

PROVING FOREIGN STATUTE.—Suit upon promissory notes reserving interest at the rate of ten per cent. Answer, that the notes were made and delivered in the State of *New York*, and not in the State of *Michigan*, where they bore date; that by the laws of *New York* seven per cent. interest only could be taken or reserved, and if a greater rate of interest should be reserved, such note was void. Two sections of the law of *New York* were set out, the first fixing the legal rate of interest at seven per cent., and the second providing that when a greater rate "than as above described" was reserved, the contract should be void. On the trial of the cause, the second section only of the law of *New York* was given in evidence, and judgment was given for the principal of the notes, and interest at the rate of six per cent.

Held, that as the section of the law of *New York* given in evidence, did not show what the legal rate of interest in that State was, the judgment of the court was not erroneous. *Kenyon et al. v. Smith*.... 11

V.

VARIANCE.

PROMISSORY NOTE.—In a complaint

upon a promissory note, the note was described as payable to the plaintiff, while the note filed with the complaint, and given in evidence, was payable to "A, or bearer."

Held, that as the variance could have been cured by amendment in the court below, the Supreme Court will, on appeal, regard the amendment as having been made. *McKaley et al. v. Shank*..... 258

VENDOR AND PURCHASER.

Mis-description of Lands. See MISTAKE, 4.

1. MORTGAGEE—PRE-EXISTING DEBT.

The mortgagee who takes a mortgage in good faith to secure a pre-existing debt, is entitled to be regarded as a purchaser for a valuable consideration, and to be protected as such. *Babcock et al. v. Jordan*..... 14

2. MISTAKE—SPECIFIC PERFORMANCE.

Suit by A and wife against B, for the partition of lands. The complaint alleged that A was entitled in his own right to the undivided four-elevenths, and his wife to one-eleventh of the lands, and the defendant, B, to the remaining six-elevenths. Answer by B, that the parties had before suit mutually agreed to a partition, and that the plaintiff, under the name of A, had in pursuance of such agreement executed and delivered to the defendant, B, a bond, by which they bound themselves to convey to him a certain portion of said lands, and that he, B, had made a like bond to the plaintiff, by which he agreed to convey to A the other part of said lands; that each took possession of their separate tracts, and that defendant had made improvements; that at the time stipulated, he had made and tendered a deed to A for the land so set apart to him, and demanded of him a deed for the land agreed to be conveyed to him, defendant; that A refused to accept the deed, or to perform the obligations of his bond to defendant. Prayer, that a specific performance be decreed

against the plaintiffs. The court decreed a specific performance of the bond against A and wife, though the bond did not purport to be executed by the wife.

Held, that the court below erred in decreeing a specific performance of the bond against the wife of A, as the bond set up in the answer contained no obligation to be performed by her, and such a decree operated to divest her of a portion of her estate, and transfer it to the husband.

Held, also, that the answer setting up a bond not purporting to be executed by the wife, was no bar to the action as to her, and the demurrer to the reply should have been sustained to the answer. *Beaver et ux v. Tritipo*..... 41

3. RESULTING TRUST.—When an estate is purchased in the name of one, with money belonging to and paid by another, a trust results in favor of the party to whom the money belonged, and this trust, thus implied by law, cannot be defeated by the fact that it was orally declared and acknowledged by the parties. *McDonald et al. v. McDonald*..... 68

4. ADVERSE POSSESSION.—To constitute an adverse possession of lands, so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act in good faith, and in the belief that he has title thereto, and his possession must be under color and claim of title, exclusive of any other right. *Moore et al. v. Worley et al.*..... 81

5. PLEADING—DEMAND OF CONVEYANCE.—A, who owned a farm in Kentucky, agreed in writing with his son B, to convey all of his real estate to the son, in consideration of his agreement to support and maintain A and his wife during their natural lives. During the life of the father, the son, with the father's consent, traded and assigned the lands in Kentucky for lands in Indiana, and, by the agreement and direction of the son, the conveyance was taken in the name

of the father, for the purpose of securing the performance of the agreement between them. Suit by the son, alleging these facts; that he had fully performed the agreement on his part, and that the father had died, and by his will devised a portion of the lands to others, who were made defendants.

Held, that neither the deceased nor the defendants were in default in not making the conveyance to the son, no demand having been made upon them, and it not appearing that the defendants were ever apprised of his rights. *Blasingame v. Blasingame*..... 86

6. SPECIFIC PERFORMANCE.—A sold to B a tract of land, and put him in possession, agreeing to execute to him, on payment of the purchase money, a title bond, conditioned for the execution of a deed, as soon as A got his deed. Suit by B to compel the execution of the title bond, alleging payment of the purchase money.

Held, that B was entitled to a decree for the specific performance of the contract. *Sterling v. Klepattle*... 94

7. POSSESSION—CONSTRUCTIVE NOTICE.—VOIDABLE SALE.—A conveyed to the Cincinnati, New Castle & Michigan Railroad Company, in May, 1853, a tract of land in the town of Muncie, to be paid for in the capital stock of the company. In his written proposition to the company, which was accepted, he reserved the right to use and occupy the premises until the road should be completed to the town of Wabash, but, by mistake, the reservation was not inserted in the deed. In August, of the same year, he also conveyed to the company the east half of the north-east quarter of section 21, in township 20 north, of range 10, east. In September, the railroad company executed to A and B a deed of trust, conveying to them the two tracts of land conveyed by A to the company, together with a large amount of other lands, to be held by them in trust, to secure the payment of \$75,000, for which the company had issued its bonds. By mistake, the eighty

acre tract of land, conveyed by A to the company, was described in the deed of trust as the west half of the north-east quarter, &c. The bonds secured by the deed of trust had each of them a certificate attached, signed by the trustees, stating that the company had conveyed to them certain real estate to secure the payment of certain bonds, "of which the above obligation is one." The deed itself provided that the company should have the right to sell any part of the lands deeded, for not less than the appraised value mentioned in the deed, and that, upon the surrender to the trustees of an amount of the bonds equal to such appraised value, they should convey to the purchaser. The *Cincinnati, New Castle & Michigan Railroad Company* was afterward consolidated with other companies, and the new corporation took the name of the *Cincinnati & Chicago Railroad Company*. In January, 1857, A purchased of the consolidated company the eighty acre tract formerly conveyed by him to the old company, by surrendering \$3000 of the bonds secured by the deed of trust, and crediting himself with \$200 due for services as trustee, and, the mistake in the description being then first discovered, took a deed from the company, in whom the legal title was supposed to be by reason of the mistake. In September, 1857, A filed his complaint against the consolidated company, alleging a mistake in the deed made by him for the lot in *Muncie*, in the omission of the condition that he should retain possession until the road was completed to *Wabash*, and a decree was entered reforming the deed in that particular. Subsequently, C and D, who held all of the outstanding bonds secured by the deed of trust, amounting to \$15,000, filed their bill for a foreclosure against the company, and A and B, the trustees named in the deed, and obtained a decree of foreclosure, and for the sale of all the lands described in the deed, "except such lands as had been purchased with bonds secured by the deed of trust." The mistake in the description of

the eighty acre tract was carried into the decree and sheriff's advertisement, but, the error being discovered on the day of sale, the land was sold and conveyed by a correct description to C and D, as was also the lot in the town of *Muncie*. Suit by C and D against A to recover the possession of the lands, and judgment of ouster against A. On the trial, A offered to prove that C and D had notice, at the time they purchased the bonds sued on, of his equity to have his deed for the town lot reformed.

Held, that the judgment was right as to the lot in *Muncie*, as C and D were not parties to the proceedings to reform the deed of A to the company and, consequently, were not bound thereby.

Held, also, that the possession by A of the town property was not, under the circumstances, constructive notice to the original purchaser of the bonds from the company of A's equity. The purchaser had a right to rest upon the certificate made by A as trustee.

Held, also, that the sale of the eighty acre tract of land by the company to A, was in substantial compliance with the terms of the deed of trust, by which the company reserved the right to sell any of the lands, on the surrender of an amount of the bonds equal to the appraised value of the lands sold.

Held, also, that if the fact that A paid \$200 of the appraised value in a claim for services as trustee, and not in bonds, rendered the sale to him voidable, it could only be avoided by a direct proceeding to set aside the sale, and the repayment to him of the purchase money and interest, *Sample v. Rowe et al.*.....208

8. FRAUD.—A took a conveyance of lands from his brother-in-law, B, for a consideration equal to only one-half of their value, and was informed, at the time, of the intention of B to avoid the payment of a debt then in suit, and upon which judgment was afterward recovered.

Held, that the transaction must be

- regarded as fraudulent. *Bray v. Hussey*..... 228
9. **FIXTURES.**—A erected a mill upon land owned by B, under a parol contract that if B should pay off a certain judgment which was a lien on the land, and should then convey to A an undivided half of the land, he, B, should become the owner of one-half of the mill. Until the judgment was paid the mill was to remain the individual property of A. B failed to pay the judgment, and the land was sold upon an execution issued thereon.
- Held*, that after the sale of the land on the execution, the mill, though standing upon the land, was the personal property of A, who had a perfect right to remove it from the land.
- Held*, also, that A had acquired no interest in the land as a purchaser, and his right to remove the mill did not depend upon the law in relation to fixtures erected by him as tenant, but upon the contract, by virtue of which he acted. *Foster et al. v. Mullen*..... 277
10. **CONTRACT FOR SALE OF REAL ESTATE—SPECIFIC PERFORMANCE.**—A, by his agent, engaged by an oral contract to sell a tract of land to B. A afterward, in person, orally engaged to sell the same tract to C. Subsequently, A made a title bond to B for the land, but before having executed a deed, conveyed the land by deed to C, who had full knowledge of the outstanding title bond.
- Held*, that as between B and C, B had the prior equity, and could enforce a specific performance. *Hunter et al. v. Bales*..... 299
11. **SAME.**—In equity, a contract for the sale of land is not merely executory, but the vendee becomes the owner, and the vendor is seized in trust for him, and has a mere lien for the purchase money. But the contract must be such an one as would support a decree for specific performance..... *Ibid.*
12. **SPECIFIC PERFORMANCE—TENDER.**—In a suit for specific performance, where money is due from the plaintiff, it is sufficient for him to offer by his complaint to bring it into court, whenever the same shall be liquidated, and he has a decree for performance. *Ibid.*
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14. **RESCISSIO—STATU QUO.**—Where a vendee of real estate has entered into and retained possession for a number of years, receiving the rents, changing the condition of the estate, and making lasting improvements, he cannot restore to the vendor what he received from him and hence he cannot have a rescission of the contract. *Patten v. Stewart*..... 332
15. **SAME—TENDER OF DEED.**—Where a vendee of real estate has received a conveyance, and has entered into possession, he must, if he seeks a rescission, of the contract, tender to his vendor a reconveyance, and offer to restore to him the possession, before commencing his action..... *Ibid.*
16. **SAME—FRAUD.**—Suit by the vendee to rescind a conveyance of real estate, for fraud. The fraudulent representation was alleged to be, "that the vendor had a clear and undisputed title to the land," while, in fact, he did not then, nor at any time afterward, have a good and valid title. The deed contained a covenant that the vendor "was lawfully and solely possessed of the title to the land in fee simple," and the vendee had not been disturbed in his possession. *Quare*. Whether the facts alleged constituted such a fraud as would entitle the vendee to a rescission..... *Ibid.*
17. **VENDOR'S LIEN.**—A sold to B certain real estate, by a contract in writing, for the sum of \$2,500. By the terms of the contract, A was to execute a deed of conveyance, on the payment of \$1,000, at a day fixed, and was to receive the notes of B for the residue of the purchase money, payable at one

and two years from date. It was further stipulated that on the execution of the deed, B should have possession of the premises, "free from rent or charge." The deed was executed and delivered at the time stipulated. Afterward, A caused the execution of the contract of sale to be proved by the subscribing witness, and the contract to be recorded in the recorder's office. Suit by A to enforce a vendor's lien against the vendee of B, who had purchased after the recording of the contract of sale, but without actual notice of the equitable lien.

Held, that section 85 of the "Act concerning real estate and the alienation thereof," 1 G. & H. 266, authorizes the recording of executory contracts for the sale of lands, and the record of such an instrument is constructive notice of its contents to all subsequent purchasers or mortgagees.

Held, also, that while the record of the deed from A to B was *prima facie* evidence that the purchase money had been paid, the record of the original contract of sale was notice to all subsequent purchasers that a portion of the purchase money remained unpaid, and constituted an equitable lien upon the land.

Held, also, that the stipulation in the contract, that B was to have possession on the execution of the deed, "free from rent or charge," was not a waiver or release of the vendor's lien. *Case v. Bumstead*...429

18. HUSBAND AND WIFE—RESULTING TRUST.—A conveyance having been made in 1835, to husband and wife, the husband, in 1850, executed a deed which, after reciting that the land had been purchased with the money of the wife, purported to convey and limit the descent of the land, on the death of him and his wife, to A, B and C, the children of the wife, to the exclusion of his children by a former marriage. Afterward, the husband and wife joined in conveying separate parcels of the land to A, B and C.

Held, that the husband held the land only as a trustee for the wife.

Held, also, that the several conveyances to A, B and C were valid. *Noble v. Morris et al.*.....478

VENUE.

See PRACTICE, 48.

VERDICT.

Defects in pleading cured by. See PLEADING, 10.

1. SPECIAL FINDINGS.—GENERAL VERDICT.—The special findings of the jury override the general verdict only when both cannot stand, and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issue, before the court can be called upon to give judgment against the party who has the general verdict in his favor. *Amidon et al. v. Gaff et al.*.....128
2. RECORD OF.—The verdict of a jury, when returned into court, and filed by the clerk, becomes a paper pertaining to the cause, and a part of the record, without being copied into the order book. *Sanders v. Sanders et al.*.....183
3. LOST VERDICT.—A lost verdict, like any other paper forming a part of the record, may be supplied by a proved copy.....*Ibid.*
4. A verdict rendered in plain and defiant opposition to all the evidence ought instantly to be set aside. *Crossley et al. v. O'Brien*...325

VOLUNTARY ASSIGNMENTS.

1. SALE TO PAY DEBTS.—A sale absolute in its terms, for the satisfaction of a debt, is not void under the act concerning voluntary assignments, (1 G. & H. 114,) merely because an excess in value of the property, over the amount of the debt, was to be returned to the debtor. *Keen et al. v. Preston*...395
2. VOLUNTARY ASSIGNMENTS.—The act concerning voluntary assignments (1 G. & H. 114,) does not apply to the transfer of property

made by a debtor not in embarrassed or failing circumstances....*Ibid.*

VOLUNTEERS.

Bounty to. See BOUNTIES.

W

WARDEN OF NORTHERN PRISON.

See STATE PRISON.

WILL.

CONTRACT TO MAKE PROVISION BY.

A agreed orally with B, in consideration that the latter would continue to live with him as a laborer on his farm, that, in addition to the usual wages for such labor, he would leave to B, in his last will, the sum of \$500. Suit by B against the executors of A, alleging that he had continued to live with, and labor for, A, up to the time of his death, and that A had failed to make the promised provision in his will.

Held, that an action will lie upon the contract against the executors. *Bell v. Hewitt's Ex'rs*.....280

WITNESS.

1. **PARTIES.**—If a party becomes a witness for himself, he stands as all other witnesses, except as to his credibility, and is not entitled to a new trial for newly discovered cumulative evidence of facts testified to by him on the trial. *Fox v. Reynolds*..... 48
2. **SAME.**—The exception to the law allowing parties to testify in their

own behalf, which excludes such testimony "in all suits where an executor, or administrator, or guardian is a party," &c., (2 G. & H. 168, note,) does not apply to an action against the heirs of a decedent to recover real estate or declare a trust, though one of the defendants is an infant, and answers by guardian *ad litem*. *McDonald et al. v. McDonald*..... 68

3. **SAME.**—Now that parties are permitted to testify in their own behalf, they must be held to the same prompt attendance to give their testimony that the law requires of other witnesses. *Yater et al. v. Mullen*..... 277
4. **EXECUTOR.**—In a suit against an executor, upon a contract made with the testator, where the judgment, if the plaintiff should recover, must go against the testator's estate, the executor is not a competent witness, unless called to testify by the opposite party, or by the court. *Thom et al. v. Wilson's Executor*..... 323
5. **BASTARDY.**—The testimony of a married woman is admissible in a prosecution for bastardy, to prove non-access by the husband, and that the child, though begotten and born during the marriage is a bastard. *Cuppy v. The State ex rel. Grantham*..... 389
6. **CREDIBILITY OF.—PRACTICE.**—It is the exclusive province of the jury to determine the credibility of witnesses, and the Supreme Court will not examine into their action for the purpose of disturbing their verdict. *Hollingsworth v. Pickering*..... 435

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Ex. J. G.



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